Amin bin Halim Rasip & Anor v Tenaga Nasional Bhd and other cases

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24NCC-244–07 OF 2015, 24NCC-245–06 OF 2015 AND 24NCVC-262–06 OF 2015
WONG KIAN KHEONG JC
25 MAY 2016

Companies and Corporations — Shares — Acquisition of shares — Acquisition of shares in company not owned by company — Allegation that offer shares not fair because original price at discount value — Whether company breached s 221(1) of the Capital Markets and Services Act 2007 and/or s 41(1)(b) of the Malaysian Code on Takeovers and Mergers 2010 — Whether company contravened s 67 of the Companies Act 1965 — Whether company's compulsory acquisition of shares was constitutional under art 13(1) and (2) of the Federal Constitution

The defendant held 22.12% of Integrax Bhd's ('IB') shares. The first plaintiff held about 0.53% direct interest and about 22.66% indirect interest in IB. Accordingly, he held in total, approximately 23.19% of IB's shares. The defendant offered to acquire all the shares of IB which were not owned by the defendant ('offer shares') at RM2.75 per offer share. IB's board of directors appointed M&A Securities Sdn Bhd ('MASSB') to act as an 'independent adviser' for the defendant's offer. MASSB concluded that the defendant's offer was 'not fair' because the original offer price was at a discount to the value of IB's shares ranging from RM3.60 to RM3.62. The first plaintiff then partially accepted the defendant's revised offer by selling his direct and indirect interest in IB. Within four months from date of the defendant's offer, the defendant acquired not less than nine-tenths in nominal value of the offer shares. Approximately 96% of holders of the offer shares had accepted the defendant's revised offer. As such, the defendant gave notice under s 222(1) of the Capital Markets and Services Act 2007 ('the CMSA') to acquire the offer shares held by the dissenting shareholders ('the defendant's s 222(1) Notice'). The defendant's s 222(1) Notice informed the dissenting shareholders, among others, that: (a) all the conditions for the issue of the defendant's s 222(1) Notice had been fulfilled by the defendant; (b) the dissenting shareholders were entitled within one month from the date of the defendant's s 222(1) Notice, to require the defendant to supply the dissenting shareholders with a statement of the names and addresses of all the dissenting shareholders; and (c) unless a s 224(1) Suit is filed and unless ordered otherwise by the High Court, the defendant would be entitled and bound to acquire the dissenting shareholders' shares on the terms of the defendant's revised offer. The plaintiffs proceeded with three originating summonses ('OS'). The three OS concerned the compulsory acquisition of

shares in IB. The issues that arose were, inter alia, (a) whether the defendant had breached s 221(1) of the CMSA and/or s 41(1)(b) of the Malaysian Code on Takeovers and Mergers 2010 ('the MCTM') by omitting a material fact in the take-over of IB's shares; (b) whether the defendant was an insider within the meaning of s 188(1)(a) of the CMSA; (c) whether the defendant had contravened s 67 of the Companies Act 1965 ('the CA') by using dividend declared by IB in the take-over of IB; (d) whether the court may extend the one month time period for dissenting shareholders to file an application to court under s 224(1) of the CMSA; (e) how should the court exercise its discretionary power under s 224(1)(a) and (b) of the CMSA; and (f) whether the defendant's compulsory acquisition of shares in IB, was constitutional under art 13(1) and (2) of the Federal Constitution ('the Constitution').

Held:

(1) The defendant had not breached s 67(1) of the CA in this case. There was no evidence that IB had provided any financial assistance to the defendant for the defendant's compulsory acquisition of the dissenting shareholders' shares in IB. The defendant's revised offer merely stated that the holders of the offer shares were entitled to receive the 2015 dividend. The 2015 dividend did not constitute 'financial assistance for the purpose of or in connection with' the defendant's compulsory acquisition of IB shares belonging to the dissenting shareholders within the meaning of s 67(1) of the CA (see para 54).

(2) The defendant was not an 'insider' who possessed information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of IB shares within the meaning of s 188(1)(a) of the CMSA. If the defendant was not an 'insider' under s 188(1) of the CMSA, the defendant was not subject to the prohibition imposed by s 188(2)(a) and (b) of the CMSA (see para 57).

(3) Section 224 of the CMSA does not expressly or by necessary implication, oust the court's discretionary power to extend time. As the court has the discretionary power to extend the one-month time period as provided in s 224(1) of the CMSA. The court exercised its discretion to extend time for the first and second OS to proceed on their merits. The litigating dissenting shareholders have conspired to obstruct unlawfully the defendant's compulsory acquisition of IB shares. The aforesaid lack of good faith on the part of the litigating dissenting shareholders in filing the three OS, in itself, was a sufficient ground for this court to exercise its discretion to refuse to act under s 224(1)(a) or (b) of the CMSA (see paras 72 & 92).

(4) There was no evidence that the defendant breached any provision in the CMSA, CA and/or MCTM so as to persuade this court to invoke its

discretion under s 224(1)(a) or (b) of the CMSA. The litigating dissenting shareholders failed to discharge the legal onus on a balance of probabilities to persuade this court to exercise its discretion under s 224(1)(a) or (b) of the CMSA (see paras 104 & 119).

(5) Article 13(1) of the Constitution does not apply to a compulsory acquisition of a company's shares as provided in ss 222 and 224 of the CMSA. Compulsory acquisitions of property is provided in art 13(2) of the Constitution. Article 13(1) of the FC does not restrict Parliament's legislative powers. Parliament is clearly empowered under arts 73(a), 74(1) and Item 8(c) of List 1 (Federal List) of the Ninth Schedule to the Constitution, to enact ss 222 and 224 of the CMSA. Accordingly, ss 222 and 224 of the CMSA could not be contrary to art 13(1) of the Constitution. The defendant had complied with s 222 of the CMSA in this case. The litigating dissenting shareholders have also failed to discharge the legal burden to persuade this court to act under s 224(1)(a) or (b) of the CMSA. Accordingly, the defendant's compulsory acquisition of IB shares belonging to the litigating dissenting shareholders, was both constitutional and lawful (see paras 103 & 108).

[Bahasa Malaysia summary

Defendan memegang 22.12% saham Integrax Bhd ('IB'). Plaintif pertama memegang lebih kurang 0.53% faedah langsung dan lebih kurang 22.66% faedah tidak langsung dalam IB. Sewajarnya, dia memegang keseluruhannya, lebih kurang 23.19% saham IB. Defendan telah menawarkan untuk memperoleh semua saham IB yang tidak dimiliki oleh defendan ('saham tawaran') pada RM2.75 satu saham tawaran. Lembaga pengarah IB telah melantik M&A Securities Sdn Bhd ('MASSB') untuk bertindak sebagai 'independent adviser' bagi tawaran defendan. MASSB telah memutuskan bahawa tawaran defendan adalah 'not fair' kerana harga tawaran asal pada diskaun kepada nilai saham IB yang berkisar daripada RM3.60 hingga RM3.62. Plaintif pertama kemudian menerima sebahagian tawaran semakan defendan dengan menjual kepentingan langsung dan tidak langsungnya pada IB. Dalam tempoh empat bulan dari tarikh tawaran defendan, defendan telah memperoleh tidak kurang daripada sembilan per sepuluh dalam nilai nominal saham tawaran itu. Lebih kurang 96% pemegang saham tawaran itu telah menerima tawaran semakan defendan. Oleh itu, defendan telah memberi notis di bawah s 222(1) Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') untuk memperoleh saham tawaran yang dipegang oleh pemegang saham yang menentang ('notis s 222(1) defendan'). Notis s 222(1) defendan memaklumkan pemegang saham yang menentang, antara lain, bahawa: (a) semua syarat untuk keluaran notis s 222(1) defendan telahpun dipenuhi oleh defendan; (b) pemegang saham yang menentang berhak dalam tempoh satu bulan dari tarikh notis s 222(1) defendan, menghendaki defendan membekalkan pemegang saham yang menentang dengan satu kenyataan nama

dan alamat semua pemegang saham yang menentang; dan (c) kecuali guaman s 224(1) difailkan dan kecuali diperintahkan sebaliknya oleh Mahkamah Tinggi, defendan berhak dan terikat untuk memperoleh saham pemegang saham yang menentang atas terma tawaran semakan defendan. Plaintif-plaintif meneruskan dengan tiga saman pemula ('SP'). Tiga SP adalah berkenaan pemerolehan wajib saham dalam IB. Isu-isu yang timbul adalah, antara lain: (a) sama ada defendan telah melanggar s 221(1) APMP dan/atau s 41(1)(b) Kanun Pengambilalihan dan Penggabungan Malaysia 2010 ('KPPM') dengan meninggalkan fakta penting dalam pengambilalihan saham IB; (b) sama ada defendan adalah orang dalam mengikut maksud s 188(1)(1) KPPM; (c) sama ada defendan telah melanggar s 67 Akta Syarikat 1965 ('AS') dengan menggunakan dividen yang diisytiharkan oleh IB dalam pengambilalihan IB: (d) sama ada mahkamah boleh melanjutkan tempoh masa satu bulan untuk pemegang saham yang menentang untuk memfailkan permohonan kepada mahkamah di bawah 224(1) KPPM; (e) bagaimana mahkamah patut menggunakan kuasa budi bicaranya di bawah s 224(1)(a) dan (b) KPPM; dan (f) sama ada pemerolehan wajib saham defendan dalam IB adalah berperlembagaan di bawah perkara 13(1) dan (2) Perlembagaan Persekutuan ('Perlembagaan').

Diputuskan:

(1) Defendan tidak melanggar s 67(1) AS dalam kes ini. Tiada keterangan bahawa IB telah memberikan apa-apa bantuan kewangan kepada defendan untk pemerolehan wajib defendan untuk saham pemegang saham yang menentang dalam IB itu. Tawaran semakan defendan hanya menyatakan bahawa pemegang saham tawaran itu berhak untuk menerima dividen 2015. Dividen 2015 itu tidak membentuk 'financial assistance for the purpose of or in connection with' pemerolehan wajib defendan untuk saham IB milik pemegang saham yang menentang dalam maksud s 67(1) AS (lihat perenggan 54).

(2) Defendan bukan 'insider' yang memiliki maklumat yang biasanya tersedia yang mana apabila biasanya tersedia seseorang yang munasabah akan menjangkakan ia mempunyai kesan material ke atas harga atau nilai saham IB dalam maksud s 188(1)(a) APMP. Jika defendan bukan 'insider' di bawah s 188(1) APMP, defendan tidak tertakluk kepada larangan yang dikenakan oleh s 188(2)(a) dan (b) APMP (lihat perenggan 57).

(3) Seksyen 224 APMP tidak menyatakan atau dengan implikasi yang perlu, mengusir kuasa budi bicara mahkamah untuk melanjutkan masa. Oleh kerana mahkamah mempunyai kuasa budi bicara untuk melanjutkan tempoh masa satu bulan sepertimana diperuntukkan dalam s 224(1) APMP. Mahkamah menggunakan budi bciaranya untuk melanjutkan masa bagi SP pertama dan kedua bagi meneruskan atas merit mereka.

Pemegang saham yang menentang dalam perbicaraan telah berkomplot menyalahi undang-undang pemerolehan defendan dalam saham IB. Kekurangan niat baik di pihak pemegang saham yang menentang dalam perbicaraan yang memfailkan tiga SP itu, dengan sendirinya, adalah alasan mencukupi untuk mahkamah ini menggunakan budi bicaranya untuk menolak tindakan di bawah s 224(1)(a) atau (b) APMP (lihat perenggan 72 & 92).

(4) Tiada keterangan bahawa defendan telah melanggar apa-apa peruntukan dalam APMP, AS dan/atau KPPM yang meyakinkan mahkamah ini untuk menggunakan budi bicaranya di bawah s 224(1)(a) atau (b) APMP. Pemegang saham yang menentang dalam perbicaraan gagal melepaskan tanggungjawab undang-undang atas imbangan kebarangkalian untuk meyakinkan mahkamah menggunakan budi bicaranya di bawah s 224(1)(a) atau (b) APMP (lihat perenggan 104 & 119).

(5) Perkara 13(1) Perlembagaan tidak terpakai kepada pemerolehan wajib saham syarikat seperti mana diperuntukkan dalam ss 222 dan 224 APMP. Pemerolehan wajib hartanah diperuntukkan dalam perkara 13(2) Perlembagaan. Perkara 13(1) Perlembagaan tidak menghalang kuasa perundangan Parlimen. Parlimen jelas diberi kuasa di bawah perkara-perkara 73(a), 74(1) dan Butiran 8(c) Senarai 1 ('Senarai Persekutuan') Jadual Kesembilan Perlembagaan, untuk menggubal ss 22 dan 224 APMP. Sewajarnya, ss 222 dan 224 APMP tidak boleh bertentangan dengan perkara 13(1) Perlembagaan. Defendan telah mematuhi s 222 APMP dalam kes ini. Pemegang saham yang menentang dalam perbicaraan telah gagal melepaskan beban undang-undang untuk meyakinkan mahkamah ini untuk bertindak di bawah s 24(1)(a) atau (b) APMP. Sewajarnya, pemerolehan wajib defendan dalam saham IB yang dimiliki pemegang saham yang menentang dalam perbicaraan itu, adalah berperlembagaan dan sah (lihat perenggan 103 & 108).]

Notes

For cases on acquisition of shares, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1044–1048.

Cases referred to

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97; [2006] 5 AMR 585, FC (refd)

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)

Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor [2003] 6 MLJ 49, HC (refd)

Austrim Nylex Ltd v Kroll & Ors (No 3) (2002) 42 ACSR 479, SC (refd)

Bugle Press Ltd, Re [1961] 1 Ch 270, Ch D (refd)

Capricorn Diamonds Investment Pty Ltd v Catto & Ors [2002] VSC 105, SC (refd)
Chez Nico (Restaurants) Ltd, Re [1992] BCLC 192, HC (refd)
Coleman v Myers [1977] 2 NZLR 225, CA (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, intervener) [2004] 2 MLJ 257, FC (refd)
Daniel Johannes Jacobs Vlok NO & Ors v Sun International South Africa Ltd & Ors Case No 19443 of 2012 (unreported), HC (refd)
Deans, Re [1986] 2 NZLR 271, HC (refd)
Elkington v Vockbay Pty Ltd (1993) 10 ACSR 785, SC (refd)
Esso Standard (Inter-America) Inc v JW Enterprises Inc & Ors [1963] SCR 144; 37 DLR (2d) 598, SC (refd)
Evertite Locknuts Ltd, Re [1945] 1 Ch 220, Ch D (refd)
Freeland (Singapore) Pte Ltd, Re 1977 CC No 9931, SC (refd)
Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 6, HC (refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437; [1997] 1 AMR 120, CA (refd)
Government of Malaysia & Anor v Selangor Pilot Association [1977] 1 MLJ 133, PC (refd)
Grierson, Oldham and Adams Ltd, Re [1967] 1 All ER 192, Ch D (refd)
Hee Cheng v Krishnan [1955] 1 MLJ 103 (refd)
Hoare & Co Ltd, Re [1933] All ER Rep 105, Ch D (refd)
Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1998] 2 MLJ 440, CA (refd)
Kinwat Holdings Pty Ltd v Platform Pty Ltd (1982) 6 ACLR 398, SC (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)
Milburn v Pivot Ltd [1997] 25 ACSR 237, FC (refd)
Ng Chin Siu & Sons Rubber Estate Sdn Bhd v Pentadbir Tanah Hilir Perak & Anor Civil Appeal No A-01–794 of 2010 (unreported), CA (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97, FC (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)
Petroliam Nasional Bhd & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)
Philip Hoalim Jr & Anor v State Commissioner, Penang [1974] 2 MLJ 100, FC (refd)
Plaza Fabrics (Tauranga) Ltd v National Airlines Co Ltd [1992] 1 NZLR 584, HC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)

PP v Tan Siew Hui [2008] MLJU 81; [2008] 8 CLJ 142, HC (refd)
Press Caps Ltd, Re [1949] 1 All ER 1013, CA (refd)
Rossfield Group Operations Pty Ltd v Austral Group Ltd (1980) 5 ACLR 290, SC (refd)
Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (refd)
See Teow Koon v Kian Joo Factory Bhd & Ors [2016] MLRHU 153, HC (refd)
Selangor Pilot Association (1946) v Government of Malaysia & Anor [1975] 2 MLJ 66, FC (refd)
Shanta Holdings Sdn Bhd v Golden Uni-Consortium [2008] 2 MLJ 609, FC (refd)
Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581; [1997] 1 CLJ 300, CA (refd)
Sussex Brick Co Ltd, Re [1960] 1 All ER 772, Ch D (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
Wallersteiner v Moir [1974] 1 WLR 991, CA (refd)
Wellington Publishing Co Ltd, Re [1973] 1 NZLR 133, SC (refd)
Winpar Holdings Ltd v Austrim Nylex Ltd (No 2) (2005) 56 ACSR 524, SC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 184, 184(1), (1)(a), (1)(b), 188, 188(1), (1)(a), (2), 216(1), 221, 221(1), (1)(a), (1)(B), 222, 222(1), (2), (3), (7), (7)(b), 224, 224(1), (1)(a), (1)(b), (2), (4), (4)(a), (4)(b), 375(1)
Companies Act 1965 ss 16(5), 31, 67, 67(1), 131, 131(1)
Companies Act 1961 (Queensland) [AU] s 67
Companies Act 1961 (Victoria) [AU] s 180X(6)
Companies Act 1952 [CN] s 128
Companies Act 1929 [UK] s 155
Companies Act 1948 [UK] s 209
Companies Act 1985 [UK] s 430C(1)
Companies Act 1955 [NZ] ss 62(1), 208(1)
Companies Act 1993 [NZ] s 76
Companies Act 2008 [ZAF] ss 124, 124(2)(a)
Corporation Act 1989 [AU] ss 701, 701(6)(b)
Corporations Act 2001 [AU] ss 664F, 664F(1), (3), (4)
Courts of Judicature Act 1964 s 25(2), para 8, Schedule
Evidence Act 1950 ss 101(1), (2), 102
Federal Constitution arts 13, 13(1), (2), 73(a), 74(1), 160(2), Ninth Schedule, Item 8(c), List 1
Interpretation Acts 1948 and 1967 ss 2(1)(a), 17A, Part I
Malaysian Code on Takeovers and Mergers 2010 ss 41, 41(1)(b)

Palm Oil Research and Development Act 1979
Rules of Court 2012 O 4 r 1(1), O 15 rr 6(2)(b), (2)(b)(i), (2)(b)(ii), O 59 rr 3(2), 16(2), (2)(a), (3), (4), O 92 r 4
Sale of Goods Act 1957 ss 2, 5(1)
Securities Commission Act 1993 s 32B(1)
Securities Industry Code [AU] s 128(1)

Cheong Sek Kwan (SK Cheong) in Originationg Summons Nos 24NCC-244–07 of 2015 and 24NCC-245–06 of 2015 for the plaintiff.
Mohd Izral bin Mohamed Khairi (Cheang Lek Choy with him) (Lek Choy & Co) in Originationg Summons No 24NCVC-262–06 of 2015 for the plaintiff.
Saheran Suhendran (Lynette Yeow and Izzat Zamri) (Chua Assoc) in Originating Summons Nos 24NCC-244–07 of 2015, 24NCC-245–06 of 2015 and 24NCVC-262–06 of 2015 for the defendants.
Cheong Sek Kwan (SK Cheong) in Originating Summons Nos 24NCC-244–07 of 2015, 24NCC-245–06 of 2015 and 24NCVC-262–06 of 2015 for the proposed intervener.

Wong Kian Kheong JC:

INTRODUCTION

[1] These three originating summonses ('3 OS') concerned the compulsory acquisition of shares in a public listed company, Integrax Bhd ('IB'), by the defendant company ('the defendant'). The following issues, among others, arise in these 3 OS:

(a) whether shareholders of IB who had not accepted the defendant's take-over offer ('dissenting shareholders') and who had not filed suits under s 224(1) of the Capital Markets and Services Act 2007 ('the CMSA'), could intervene in these 3 OS under O 15 r 6(2)(b)(ii) , O 92 r 4 of the Rules of Court 2012 ('the RC') and/or the court's inherent jurisdiction;

(b) pending the disposal of the 3 OS, could the defendant apply for leave of the court to continue with the defendant's compulsory acquisition of IB shares belonging to dissenting shareholders who had not filed suits under s 224(1) of the CMSA ('non-litigating dissenting shareholders')?;

(c) whether the defendant had breached s 221(1) of the CMSA and/or s 41(1)(b) of the Malaysian Code on Takeovers and Mergers 2010 ('the MCTM') by omitting a material fact in the take-over of IB's shares;

(d) whether the defendant had contravened s 67 of the Companies Act 1965 ('the CA') by using dividend declared by IB in the take-over of IB;

(e) whether the defendant had committed insider trading under s 188(2) of the CMSA in respect of the defendant's acquisition of shares in IB;

(f) whether the Sale of Goods Act 1957 ('the SGA') applies to the defendant's compulsory acquisition of the dissenting shareholders' shares in IB;

(g) whether the court may extend the one month time period for dissenting shareholders to file an application to court under s 224(1) of the CMSA (s 224(1) Suit);

(h) how should the court exercise its discretionary power under s 224(1)(a) and (b) of the CMSA?;

(i) whether the defendant's compulsory acquisition of shares in IB, was constitutional under art 13(1) and (2) of the Federal Constitution ('the FC'); and

(j) how should the court exercise its discretion under s 224(4)(a) and/or (b) of the CMSA in respect of costs of these 3 OS?

PARTIES

[2] The plaintiffs in the 3 OS are as follows:

(a) in OS No 24NCC-244–07 of 2015 ('first OS'), the plaintiffs are En Amin bin Halim Rasip ('En Amin') and his wife, Pn Nor'aini bt Hashim ('Pn Nor'aini');

(b) the plaintiff in OS No 24NCC-245–07 of 2015 ('second OS') is Mr Yau Wai Leong ('Mr Yau'); and

(c) in OS No 24NCVC-262–06 of 2015 ('third OS'), the plaintiff is Mr Chan Kok Keong ('Mr Chan').

BACKGROUND

[3] As at 23 January 2015:

(a) the defendant held 22.12% of IB's shares; and

(b) En Amin held about 0.53% direct interest and about 22.66% indirect interest in IB (comprising En Amin's indirect interest of approximately 21.21% and Pn Nor'aini's direct interest of 1.45%). Accordingly, En Amin held in total, approximately 23.19% of IB's shares.

[4] By way of an offer document dated 30 January 2015 ('the defendant's offer'), the defendant offered to acquire all the shares of IB which were not owned by the defendant ('offer shares') at RM2.75 per offer share ('original offer price').

[5] On 16 January 2015, IB's board of directors ('BOD') had appointed M&A Securities Sdn Bhd ('MASSB') to act as an 'Independent Adviser' for the defendant's offer.

[6] MASSB sent an 'Independent Advice Letter' dated 16 February 2015 to the holders of the offer shares (IAL dated 16 February 2015). The IAL dated 16 February 2015 stated, among others:

(a) MASSB had been provided by IB's management with, among others, the draft 'JTUA 3', the jetty terminal usage agreement ('JTUA 3') which was pending execution by Lekir Bulk Terminal Sdn Bhd ('LBTSB'), a subsidiary of IB, and TNB Manjung Five Sdn Bhd ('TNB Manjung 5'), a wholly-owned subsidiary of the defendant — sub-para 4.2(e) IAL dated 16 February 2015;

(b) MASSB had assessed the 'fairness' and 'reasonableness' of the defendant's offer in accordance with paras 3.1 and 3.2 of Practice Note 15 of the MCTM ('Practice Note 15') — para 5 IAL dated 16 February 2015;

(c) in respect of JTUA 3:

(i) MASSB was of the view that JTUA 3, when executed, would 'contribute positively to the future revenue and earnings stream of Integrax Group'. According to MASSB, JTUA 3, when executed, would provide long-term recurrent and sustainable earnings to the Integrax Group (please see sub-para 10.1.1 IAL dated 16 February 2015);

(ii) IB's BOD had approved JTUA 3 for execution. MASSB stated under the title 'Our comments' that MASSB was of the view that JTUA 3 would be executed 'notwithstanding the outcome' of the defendant's offer; and

(iii) MASSB viewed the future prospects of the IB Group as optimistic on the back of, among others, the 'new' JTUA 3;

(d) MASSB concluded that the defendant's offer was 'not fair' because the original offer price was at a discount to the value of IB's shares ranging from RM3.60 to RM3.62;

(e) MASSB was of the view that the defendant's offer was 'reasonable' because:

(i) the analysis of the average daily trading volume as a percentage of the free float of IB shares of 0.18%, suggested that trading of IB shares was relatively illiquid compared to the trading of the shares of the local Bursa Malaysia KLCI Index. The trading liquidity of IB shares might further deteriorate if the defendant's shares increase due to acceptance of the defendant's offer and the defendant's

A acquisition of IB shares from the open market; and

(ii) IB's BOD had not received any competing offer for IB shares. Nor did IB's BOD receive any offer to acquire the assets and liabilities of IB. Furthermore, IB's BOD did not intend to seek another person to make an alternative take-over offer for the offer shares;

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(f) MASSB concluded that the defendant's offer was 'not fair but reasonable'. Given the value of IB shares of RM3.60 to RM3.62 was 30.9% higher than the original offer price, MASSB's 'not fair' view outweighed MASSB's 'reasonable' view. As such, MASSB recommended to the holders of the offer shares to reject the defendant's offer ('MASSB's first recommendation').

C

[7] On 16 February 2015, IB's BOD issued an 'Independent Advice Circular' to IB's shareholders (IAC dated 16 February 2015). The IAC dated 16 February 2015 included the IAL dated 16 February 2015 and stated, among others:

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(a) IB's BOD concurred with MASSB's first recommendation; and

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(b) IB's BOD recommended to the holders of the offer shares to reject the defendant's offer.

[8] The defendant's offer was revised by way of a notice of revised offer dated 25 February 2015 ('the defendant's revised offer') wherein:

F

(a) the defendant increased the original offer price to RM3.25 per offer share ('revised offer price'); and

(b) holders of the offer shares were entitled to receive the first interim dividend of 7.6 sen per offer share declared by IB on 16 February 2015 ('2015 dividend').

G

[9] On 25 February 2015, LTBSB and TNB Manjung 5 executed JTUA 3. As JTUA 3 was deemed a related party transaction ('RPT') under Bursa Malaysia's listing requirements ('LR'), JTUA 3 was required to be approved by

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IB's shareholders. For the purpose of IB's extraordinary general meeting of shareholders to approve JTUA 3 on 27 March 2015 ('EGM'), IB's board appointed Affin Hwang Investment Bank Bhd ('AHIBB') as an independent adviser.

I

[10] In respect of the defendant's revised offer:

(a) MASSB sent an IAL dated 4 March 2015 (IAL dated 4 March 2015) which:

(i) affirmed IAL dated 16 February 2015 that the defendant's revised

offer was 'not fair but reasonable'; and

(ii) recommended the holders of the offer shares to accept the defendant's revised offer ('MASSB's second recommendation');

(b) IB's BOD issued an IAC dated 4 March 2015 (IAC dated 4 March 2015) which:

(i) included IAL dated 4 March 2015; and

(ii) concurred with MASSB's opinion that the defendant's revised offer was 'not fair but reasonable';

(iii) recommended the holders of the offer shares to reject the defendant's revised offer; and

(iv) stated that En Amin had 'confirmed' that he would reject the defendant's revised offer.

[11] On 24 March 2014, AHIBB sent an independent advice letter dated 24 March 2015 (IAL dated 24 March 2015) which, among others, recommended IB's 'non-interested shareholders' to vote in favour of JTUA 3 in the EGM.

[12] IB's BOD issued an 'Independent Advice Circular' to IB's shareholders on 24 March 2015 (IAC dated 24 February 2015) which enclosed IAL dated 24 March 2015 and recommended IB's 'non-interested shareholders' to vote in favour of JTUA 3 in the EGM.

[13] On 2 April 2015, Encik Amin held 1.61% direct interest and 23.15% indirect interest in IB. Encik Amin then partially accepted the defendant's revised offer by selling his direct and indirect interest in IB. According to the defendant's affidavit, En Amin had received RM242,027,938.75 for the sale of his direct and indirect shareholding in IB. This left En Amin with a remainder of 0.003% (8,800) shares in IB worth RM28,600.

[14] Encik Amin made the following statements ('En Amin's public statements'):

(a) in '*the Sun Daily*' ('*Sun*') dated 25 March 2015, En Amin announced that the decision of the Perak Corp Bhd ('PCB') to accept the defendant's revised offer was 'impudent and lacking care, diligence and judgment and not in the best interest' of shareholders of PCB and IB;

(b) in *the Sun* dated 30 March 2015, En Amin informed IB's shareholders that En Amin was planning a RM1.2 billion 'Voluntary General Offer' for IB's shares together with other 'business entrepreneurs' ('VGO'); and

(c) En Amin stated in 'The Malaysian Reserve' dated 30 March 2015 that IB's shareholders should 'hold the line' until after 31 March 2015 because En Amin was 'firming up' a VGO.

[15] Puan Nor'aini had received RM14,097,935 for selling 4,337,826 IB shares. Puan Nor'aini was left with 10,000 IB shares (0.003%) worth RM32,500.

[16] Mr Chan initially had direct interest in IB at about 0.0017% and had reduced his direct shareholding in IB to 1,000 shares.

[17] On 10 April 2015, within four months from date of the defendant's offer, the defendant had acquired not less than nine-tenths in nominal value of the offer shares. Approximately 96% of holders of the offer shares had accepted the defendant's revised offer. As such, on 22 May 2015, the defendant gave notice under s 222(1) of the CMSA to acquire the offer shares held by the dissenting shareholders (the defendant's s 222(1) Notice). Section 216(1) of the CMSA defines a 'dissenting shareholder' to include any shareholder who has not accepted a takeover offer.

[18] The defendant's s 222(1) Notice had been issued by En Fazlur Rahman bin Zainuddin ('En Fazlur'), the defendant's chief financial officer/vice president (group finance), on behalf of the defendant. The defendant's BOD had passed a resolution on 9 January 2015 which had, among others, authorised En Fazlur 'to do all such acts as may be necessary including negotiation, finalisation and execution of the necessary documents/agreements' with regard to the defendant's offer ('the defendant's BOD resolution dated 9 January 2015').

[19] The defendant's s 222(1) Notice informed the dissenting shareholders as follows, among others:

(a) all the conditions for the issue of the defendant's s 222(1) Notice had been fulfilled by the defendant as evidenced in a statutory declaration affirmed by En Fazlur ('the defendant's SD'). A copy of the defendant's SD had been enclosed in the defendant's s 222(1) Notice;

(b) the dissenting shareholders were entitled within one month from the date of the defendant's s 222(1) Notice, to require the defendant to supply the dissenting shareholders with a statement of the names and addresses of all the dissenting shareholders as shown in IB's register of members ('requested information') and the defendant would not be entitled or bound to acquire the dissenting shareholders' shares until 14 days after the posting of the requested information to the dissenting shareholders; and

(c) unless a s 224(1) Suit is filed on or before 22 June 2015 (one month from date of the defendant's s 222(1) Notice) and unless ordered otherwise by the High Court, the defendant would be entitled and bound to acquire the dissenting shareholders' shares on the terms of the defendant's revised offer.

[20] On 4 June 2015, the defendant received a request from Mr Chan for the requested information. The defendant gave Mr Chan the requested information on 9 June 2015.

[21] Encik Amin's previous solicitors, Messrs Chan & Assoc ('Messrs CA'), sent a letter dated 8 June 2015 to the defendant and all its directors ('Messrs CA's letter dated 8 June 2015'). Messrs CA's letter dated 8 June 2015 stated, among others, as follows:

(a) En Amin was one of the 'founding shareholders' of IB and before the defendant's offer, a substantial shareholder of IB;

(b) the defendant's offer contained a material omission, namely IB had agreed with the defendant on 8 January 2015 to sign JTUA 3. As such, the defendant and its directors, individually and/or collectively, had failed to give a fair and full disclosure of JTUA 3 in the defendant's offer and had breached s 221(1) of the CMSA;

(c) LBTSB had entered into JTUA 3 with the defendant on 25 February 2015. The defendant and its directors, individually and/or collectively, had failed to disclose such a material fact to IB's shareholders. Hence, the defendant had breached s 41 of the MCTM;

(d) the defendant had in its possession price-sensitive information, namely the imminent signing of JTUA 3. Accordingly, the defendant was an 'insider' and had acquired IB's shares by way of insider trading (contrary to s 188 of the CMSA); and

(e) if Messrs CA did not hear from the defendant within seven days from the date of Messrs CA's letter dated 8 June 2015 as to what 'remedial action' would be taken by the defendant to reverse the 'illegal takeover' of IB and to 'offer a suitable sum as compensation and damages' to IB's shareholders, En Amin would not hesitate to institute legal proceedings.

[22] The names of Mr Chan and Mr Yau appeared on the letterhead of Messrs CA's letter dated 8 June 2015.

[23] On 15 June 2015, the defendant received a request from Pn Nor'aini for the requested information. The defendant gave the requested information to Pn Nor'aini on 17 June 2015. Puan Nor'aini however stated in her affidavit that she only received the requested information at about 26 June 2015.

[24] Mr Yau requested for the requested information on 16 June 2015 and the requested information was furnished to Mr Yau on 17 June 2015.

[25] The defendant's then solicitors, Messrs Kadir Andri ('Messrs KA'), replied to Messrs CA's letter dated 8 June 2015 by way of a letter dated 22 June 2015 ('Messrs KA's letter dated 22 June 2015'). According to Messrs KA's letter dated 22 June 2015, among others:

(a) the defendant denied that the defendant had breached s 221 of the CMSA or s 41 of the MCTM;

(b) if the information regarding the signing of JTUA 3 was material as at 8 January 2015, IB's BOD should have announced it to Bursa Malaysia ('Bursa') as required by the LR. IB's BOD however only announced about JTUA 3 on 25 February 2015 (IB's public announcement on 25 February 2015 (JTUA 3)), when JTUA 3 was executed by LBTSB and the defendant;

(c) the IAC dated 16 February 2015 had stated that JTUA 3 was still pending as at 16 February 2015. Furthermore, the IAC dated 16 February 2015 had given the necessary recommendation to IB's shareholders on the basis that JTUA 3 would be executed;

(d) the defendant did not commit insider trading because the defendant only acquired IB's shares on 13 April 2015, after the execution of JTUA 3 and after IB's public announcement on 25 February 2015 (JTUA 3). As such, the defendant did not trade on price-sensitive information which was not in the public domain; and

(e) En Amin was a director, deputy chairman and substantial shareholder of IB as at 8 January 2015. If En Amin had price-sensitive information on 8 January 2015 (as alleged in Messrs CA's letter dated 8 June 2015), En Amin had a duty to disclose such information to IB's shareholders and should not have traded in IB's shares.

PROCEEDINGS

[26] The first and second OS had been filed in the Kuala Lumpur High Court. The third OS was however filed in the Ipoh High Court. I will discuss the effect of filing the third OS in the Ipoh High Court subsequently in this judgment.

[27] In the first OS, En Amin and Pn Nor'aini prayed for the following relief:

(a) an extension of 14 days from the time of receipt of the requested information, to file this OS;

(b) the defendant's offer and the defendant's s 222(1) Notice were misconceived and were invalid;

(c) the acquisition of the offer shares pursuant to the defendant's s 222(1) Notice was misconceived and was invalid;

(d) the proposed acquisition of the offer shares under s 222 of the CMSA was misconceived;

(e) the defendant's s 222(1) Notice be set aside; and

(f) any other relief and consequential order which this court deems fit.

[28] The second OS had the same prayers as the first OS. The third OS had slightly different prayers as follows:

(a) the defendant's offer as referred in the defendant's s 222(1) Notice, was misconceived and was invalid;

(b) the acquisition of the offer shares referred to in the defendant's s 222(1) Notice was misconceived and was invalid;

(c) the proposed acquisition under s 222 of the CMSA was misconceived;

(d) the defendant's s 222(1) Notice be set aside; and

(e) costs in any event.

[29] On 9 September 2015, the defendant applied for and obtained an order from this court for the first and second OS to be heard together under O 4 r 1(1) of the RC. This was because the first and second OS concerned the same subject matter of dispute, namely the defendant's compulsory acquisition of the offer shares of the dissenting shareholders. On 9 September 2015, the third OS was still pending in the Ipoh High Court.

First intervention applications

[30] There are two dissenting shareholders, namely Ms Pauline a/p Nadarajah ('Ms Pauline') and Mr Ng Yot Chew ('Mr Ng').

[31] Ms Pauline and Mr Ng ('proposed interveners') applied to the Ipoh High Court to intervene in the third OS ('first intervention applications'). The learned SM Komathy Suppiah JC dismissed the first intervention applications ('dismissal of first intervention applications'). The proposed interveners did not appeal to the Court of Appeal against the dismissal of first intervention applications.

Transfer and joint hearing of 3 OS

[32] The defendant subsequently applied for and obtained an order from the Ipoh High Court on 23 November 2015 to transfer the third OS to this court. On 23 December 2015, upon an application by the defendant, I ordered all 3 OS to be heard together, once again under O 4 r 1(1) of the RC, as the 3 OS involved the defendant's compulsory acquisition of the offer shares of the dissenting shareholders.

Second intervention applications

[33] The proposed interveners applied to this court to intervene in the 3 OS ('second intervention applications'). The defendant opposed the second intervention applications.

[34] Mr Cheong Sek Kwan ('Mr Cheong') represented the proposed interveners. According to Mr Cheong, the proposed interveners were dissenting shareholders who were entitled to intervene in the 3 OS pursuant to:

(a) O 15 r 6(2)(b) of the RC; and/or

(b) the court's inherent jurisdiction.

[35] Sections 222 and 224 of the CMSA together with O 15 r 6(2)(b) and O 92 r 4 of the RC are relevant to the second intervention applications.

[36] It is to be noted that Parliament has amended s 222 of the CMSA by way of Capital Markets and Services (Amendment) Act 2015 ('Act A1499'). For the purpose of these 3 OS, Act A1499 had not been in force yet (please see PU (B) 369/2015).

[37] Sections 222 (before amendment by Act A1499) and 224 of the CMSA together with O 15 r 6(2)(b) and O 92 r 4 of the RC are reproduced below:

CMSA

Section 222 Compulsory acquisition

(1) *Subject to Section 224, where a take-over offer by an offeror to acquire all the shares or all the shares in any particular class in an offeree has, within four months after the making of the take-over offer, been accepted by the holders of not less than nine-tenths in the nominal value of those shares* or of the shares of that class (*excluding shares already held at the date of the take-over offer by the offeror or persons acting in concert), the offeror may, at any time within two months from the date the nine-tenths in the nominal value of those shares have been achieved, give notice in the manner prescribed under (MCTM) to any dissenting shareholder that it desires to acquire his shares together with a copy of a statutory declaration by the offeror that the conditions for the giving of the notice are satisfied.*

(2) *Where an offeror has given notice to any dissenting shareholder under subsection (1), the dissenting shareholder may, by demand in writing, within one month from the date of such notice, require the offeror to provide in writing the names and addresses of all other dissenting shareholders as shown in the register of members, and the offeror may only acquire the shares of the dissenting shareholders after fourteen days from the posting of those names and addresses to the dissenting shareholder*.

(3) *Upon the giving of the notice and statutory declaration under subsection (1), the offeror shall in accordance with subsection (7) acquire those shares on the terms of the take-over offer* or, if the takeover offer contained two or more alternative sets of terms, on the terms which were specified in the take-over offer as being applicable to the dissenting shareholders.

(4) A person commits an offence if he:

(a) sends a copy of a notice or statutory declaration under subsection (1) which is not in the prescribed manner; or

(b) makes a statutory declaration pursuant to subsection (1) or sends a statement pursuant to subsection (2), knowing that the declaration or the statement, as the case may be, to be false, or without having reasonable grounds for believing it to be true.

(5) Where a person is charged for an offence under subsection (4), it is a defence for him to prove that he took reasonable steps for securing compliance with that subsection.

(6) Where, during the period within which a take-over offer can be accepted, the offeror acquires or contracts to acquire any of the shares to which the take-over offer relates, otherwise than by virtue of acceptances of the take-over offer, then if:

(a) the value of the consideration for which they are acquired or contracted to be acquired ('the acquisition consideration') does not at that time exceed the value of the consideration specified in the terms of the takeover offer; or

(b) the terms of the take-over offer are subsequently revised so that when the revision is announced the value of the acquisition consideration at the time mentioned in paragraph (a) no longer exceeds the value of the consideration specified in those terms,

the offeror shall be treated, for the purposes of this section, as having acquired or contracted to acquire those shares by virtue of acceptances of the take-over offer but in relation to any other case those shares shall be treated as excluded from those to which the take-over offer relates.

(7) *Subject to Section 224, where a notice has been given by the offeror under subsection (1), the offeror shall, after the expiration of one month after the date on which the notice has been given, or where subsection (2) applies after fourteen days from the date the statement has been posted to the dissenting shareholder:*

(a) send a copy of the notice to the offeree together with an instrument of transfer executed on behalf of all such dissenting shareholders by the offeror; and

(b) pay, allot or transfer to the offeree the amount or other consideration for the shares to which the notice relates ,

and the offeree shall thereupon register the offeror as the holder of those shares.

(8) Any sums received by the offeree under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that offeree in trust for the persons entitled to the shares in respect of which the sum or other consideration was received.

(9) Where any consideration other than cash is held in trust by a company for any person under this section, it may, after the expiration of ten years from the date on which the consideration is paid, allotted or transferred to it, transfer the same to the Minister.

(10) The Minister shall sell or dispose of any consideration received under subsection (9) in such manner as he thinks fit and shall deal with the proceeds of the sale or disposal as if it were monies paid to him pursuant to the law relating to unclaimed monies.

Section 224 Application to court

(1) *Where a notice is given under subsection 222(1), the court may, on an application made by any dissenting shareholder within one month from the date on which the notice was given:*

(a) *order that the offeror shall not be entitled and shall not be bound to acquire those shares; or*

(b) *specify terms of acquisition that are different from the terms of the takeover offer*.

(2) *If an application to court is pending at the end of the period mentioned in subsection 222(2), that subsection shall not have effect until the application has been disposed of.*

(3) When the holder of any shares exercises his rights under subsection 223(1), the court may, on an application made by such holder of shares or the offeror, order that the terms on which the offeror shall acquire the shares shall be as the court thinks fit.

(4) *No order for costs shall be made against a shareholder making an application under subsection (1) or (3) unless the court considers that:*

(a) *the application was unnecessary, improper or vexatious; or*

(b) *there has been unreasonable delay in making the application or unreasonable conduct on the part of the shareholder in conducting the proceeding on the application.*

(5) Subject to subsection (6), the court may, on an application made by an offeror who has not obtained acceptances to the extent necessary for

entitling him to give notice under subsection 222(1), make an order authorising the offeror to give notices under subsection 222(1). A

(6) The court may only grant an order under subsection (5) upon being satisfied that:

(a) the failure of the offeror to obtain such acceptances was due to the inability of the offeror to trace one or more of the persons holding shares to which the take-over offer relates after having made reasonable enquiries; B

(b) the shares which the offeror has acquired or contracted to acquire by virtue of acceptances of the take-over offer, together with the shares held by the person mentioned in paragraph (a), amount to not less than the minimum specified in subsection 222(1); and C

(c) the consideration offered is fair and reasonable:

Provided that the court shall not make such an order unless it considers that it is just and equitable to do so having regard, in particular, to the number of shareholders who have been traced but who have not accepted the take-over offer. D

Order 15 rule 6(2) RC

6(2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:* E

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) *order any of the following persons to be added as a party, namely:* F

(i) *any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

(ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter*. G H

Inherent powers of the Court

Order 92 rule 4

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court (Emphasis added.) I

[38] I dismiss the second intervention applications for the following reasons:

(a) it is clear from s 224(1)(a) and (b) of the CMSA that the court hearing these 3 OS can only make an order regarding the shares of the plaintiffs in the 3 OS ('litigating dissenting shareholders'). The court cannot make any order under s 224(1)(a) and (b) of the CMSA in respect of the shares of non-litigating dissenting shareholders. As such, even if I have allowed the second intervention applications, this court cannot make any order under s 224(1)(a) and (b) of the CMSA in respect of the shares of the proposed interveners. There was therefore no room to apply O 15 r 6(2)(b)(i) of the RC in respect of the proposed interveners because their presence in these 3 OS was not necessary 'to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'. Nor could there be any resort to O 15 r 6(2)(b)(ii) of the RC as there did not exist a question or issue 'arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine' between the proposed interveners and the defendant.

In support of the defendant's application, learned counsel for the defendant, Mr Saheran Suhendran ('Mr Suhendran'), had relied on, among others, the unreported judgment dated 18 October 2013 of Synckers AJ in the South African High Court case of *Daniel Johannes Jacobs Vlok NO & Ors v Sun International South Africa Ltd & Ors* , the South Gauteng High Court, Johannesburg, Case No 19443 of 2012 ('*Vlok*'s case'). *Vlok*'s case concerned s 124 of the South Africa's Companies Act 2008 ('CA (South Africa)') which provides as follows:

> Compulsory acquisitions and squeeze out
>
> 124(1) *If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the holders of at least 90% of that class of securities, other than any such securities held before the offer by the offeror, a related or inter-related person, or persons acting in concert, or a nominee or subsidiary of any such person or persons:*
>
> (a) *within two further months, the offeror may notify the holders of the remaining securities of the class, in the prescribed manner and form:*
>
> (i) *that the offer has been accepted to that extent*; and
>
> (ii) *that the offeror desires to acquire all remaining securities of that class*; and
>
> (b) *subject to subsection (2), after giving notice in terms of paragraph (a), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer*.
>
> (2) *Within 30 business days after receiving a notice in terms of subsection (1)(a), a person may apply to a court for an order:*

(a) *that the offeror is not entitled to acquire the applicant's securities of that class*; or

(b) *imposing conditions of acquisition different from those of the original offer*.

(3) If an offer to acquire the securities of a particular class has not been accepted to the extent contemplated in subsection (1):

(a) the offeror may apply to a court for an order authorising the offeror to give a notice contemplated in subsection (1)(a); and

(b) the court may make the order applied for, if:

(i) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding securities to which the offer relates;

(ii) by virtue of acceptances of the original offer, the securities that are the subject of the application, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1);

(iii) the consideration offered is fair and reasonable; and

(iv) the court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

(4) If an offer for the acquisition of any class of securities of a regulated company has resulted in the acquisition by the offeror or a nominee or subsidiary of the offeror, or a related or inter-related person of any of them, individually or in aggregate, of sufficient securities of that class such that, together with any other securities of that class already held by that person, or those persons in aggregate, they then hold at least 90% of the securities of that class:

(a) the offeror must notify the holders of the remaining securities of the class that the offer has been accepted to that extent;

(b) within three months after receiving a notice in terms of paragraph (a), a person may demand that the offeror acquire all of the person's securities of the class concerned; and

(c) after receiving a demand in terms of paragraph (b), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(5) If an offeror has given notice in terms of subsection (1), and no order has been made in terms of subsection (3), or if the offeror has received a demand in terms of subsection (4)(b):

(a) six weeks after the date on which the notice was given or, if an application to a court is then pending, after the application has been

disposed of, or after the date on which the demand was received, as the case may be, the offeror must:

(i) transmit a copy of the notice to the regulated company whose securities are the subject of the offer, together with an instrument of transfer, executed on behalf of the holder of the those securities by any person appointed by the offeror; and

(ii) pay or transfer to that company the consideration representing the price payable by the offeror for the securities concerned;

(b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those securities.

(6) An instrument of transfer contemplated in subsection (5) is not required for any securities for which a securities warrant is for the time being outstanding.

(7) A regulated company must deposit any consideration received under this section into a separate interest bearing bank account with a banking institution registered under the Banks Act and, subject to subsection (8), those deposits must be:

(a) held in trust by the company for the person entitled to the securities in respect of which the consideration was received; and

(b) paid on demand to the person contemplated in paragraph (a), with interest to the date of payment.

(8) If a person contemplated in subsection (7)(a) fails for more than three years to demand payment of an amount held in terms of that paragraph, the amount, together with any accumulated interest, must be paid to the benefit of the Guardian's Fund of the Master of the High Court, to be held and dealt with in accordance with the rules of that Fund.

(9) In this section any reference to a 'holder of securities who has not accepted the offer' includes any holder who has failed or refused to transfer their securities to the offeror in accordance with the offer. (Emphasis added.)

Our s 224(1)(a) and (b) of the CMSA are similar to s 124(2)(a) and (b) of the CA (South Africa). As such, *Vlok*'s case is persuasive in the interpretation of our s 224(1)(a) and (b) of the CMSA. It was decided in *Vlok*'s case, at para 98:

98. *In my view, the provisions of s 124(2)(a) and (b) apply only to the transactions with the litigating dissentient minority*. (Emphasis added.)

This court's above interpretation of s 224(1)(a) and (b) of the CMSA is consistent with that taken in *Vlok*'s case;

(b) s 224(2) of the CMSA provides that s 222(2) of the CMSA (which enabled the defendant to proceed with compulsory acquisition of shares of dissenting shareholders after 14 days from the date of posting of the

required information) shall not have effect until the disposal of these 3 OS. Based on s 224(2) of the CMSA, the filing of these 3 OS could only have the effect of staying the defendant's compulsory acquisition of the IB shares owned by the litigating dissenting shareholders and not the IB shares held by the non-litigating dissenting shareholders;

(c) if the second intervention applications are allowed, this will mean that the proposed interveners can circumvent the requirement of filing a s 224(1) Suit within the one-month time period as stipulated in s 224(1) of the CMSA; and

(d) the court cannot resort to its inherent jurisdiction or O 92 r 4 of the RC in view of the express provision in s 224(1)(a) and (b) of the CMSA. reliance is placed on the following decisions of our apex courts:

(i) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 at p 181; and

(ii) the judgment of Zulkefli FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 at p 320.

The defendant's application for leave to complete acquisition of non-litigating dissenting shareholders

[39] Pending the disposal of these 3 OS, the defendant applied in court encl No 3 for liberty to complete the compulsory acquisition of the offer shares held by the non-litigating dissenting shareholders ('the defendant's application').

[40] The plaintiffs objected to the defendant's application but I had no hesitation in allowing the defendant's application. My reasons are as follows:

(a) as explained above, under s 224(1)(a) and (b) of the CMSA, these 3 OS did not concern the non-litigating dissenting shareholders. Accordingly, these 3 OS could not and should not affect or delay the defendant's compulsory acquisition of the offer shares held by the non-litigating dissenting shareholders. It was held in *Vlok*'s case, at para 102, as follows:

> 102. ... *Clearly, there can be no suspension of the implementation of the offer when there has been no court process and the period for halting the process has expired* ... (Emphasis added.); and

(b) the following cases have been cited by Mr Suhendran in support of a purposive interpretation of ss 222 and 224 of the CMSA:

(i) it was held in *Vlok*'s case, at para 105, as follows:

105. *One must also not lose sight of the major purpose of the provision: to avoid allowing the minority to oppress the (new) majority by holding the fate of its take-over bid to ransom, having the tail wag the dog. This purpose is served by providing for the compulsory buy-out when a tipping point is reached in the change of control. And yes, there is the corrective of applying for an opt-out, exercised under the auspices of the court. But unless that corrective is rendered subject to a strict and absolutely applied time-frame and mechanism for its exercise, the purpose of avoiding the tail wagging the dog can be defeated entirely. If a Damocles sword of a potential application were allowed to imperil the implementation of the transaction, even if only for a number of days, let alone weeks or months, the attendant uncertainty puts the mini-minority right back to its position of potential extortionist that was the very mischief the statutory mechanism sought to combat.* (Emphasis added.); and

(ii) *Capricorn Diamonds Investment Pty Ltd v Catto & Ors* [2002] VSC 105 is a decision of the Supreme Court of Victoria on Division 1, Part 6A.2 of the Corporations Act 2001 of Australia ('CA 2001 (Australia)') regarding compulsory acquisition of shares in companies. Warren J (as he then was) decided as follows in *Capricorn Diamonds Investment*, at pp 67–69:

The legislative history reveals that it was the primary intention of the new provisions to:
... make it easier for 90 per cent holders to acquire the benefit; and discourage 'greenmailing'.

The explanatory memorandum to the Corporate Law Economic Reform Bill ('the explanatory memorandum') states that an aim of the reforms was to 'make it easier for majority shareholders to obtain the benefits of 100 per cent ownership'.

The explanatory memorandum identifies the purpose of the legislative amendments as follows:

7.30 The Bill will extend the current legislative mechanisms for the compulsory acquisition of securities. *These are intended to balance the interests of facilitating changes in corporate ownership with the need to protect the rights of minority shareholders*.
7.31 Extending the power to compulsorily acquire securities will:

° ...

° *discourage minority shareholders from demanding a price for their securities that is above a fair value (often referred to as 'greenmailing')*

° ...

It is also relevant to consider the report by the Legal Committee on Compulsory Acquisitions for the Companies and Securities Advisory Committee ('the Legal Committee Report'). It expressed the view that *compulsory acquisitions*:

> *... can be a necessary and desirable means of corporate rationalisation. They may produce considerable economic, administrative and taxation benefits including*:
>
> ° facilitating financial restructuring;
>
> ° permitting the transfer of tax losses between wholly owned grouped companies;
>
> ° reducing administrative and reporting costs;
>
> ° avoiding greenmailing;
>
> ° protecting the confidentiality of commercial information and otherwise eliminating possible conflicts of interest in partially owned companies.
>
> *The committee considered, also, that the regularity objective was '... to balance the interests of all shareholders, to avoid either minority oppression or minority dictation*'.
>
> *In relation to the new compulsory acquisition power the report states*:
>
> 10.1 ...
>
> *It would assist a controlling entity to achieve the legal and economic advantages of full ownership, ensure equal and fair treatment of minorities and reduce the opportunity for greenmailing*.
>
> ...
>
> ...
>
> In particular, *it is evident from the explanatory memorandum that the legislature was seeking to balance the interests of the two groups of parties, that is, the interests of facilitating changes in corporate ownership with the need to protect the rights of the minority shareholders. Part of the process was the discouragement of minority shareholders from demanding a price for their securities that is above a fair value, the practice of greenmailing*. The explanatory memorandum shows that part of the objective of the legislative scheme was to remove that potential, that is, to remove the matters that would otherwise operate to force a price above fair value were there to be the ordinary commercial bargaining context in which consent of both parties is required before a transaction can be concluded ... (Emphasis added.)

Section 664F of the CA 2001 (Australia) is materially different from our s 224(1) of the CMSA. I will explain later in this judgment regarding such differences.

I accept *Vlok*'s case as laying down the purpose of statutory provisions on compulsory acquisition of a company's shares.

According to s 2(1)(a) of the Interpretation Acts 1948 and 1967 ('the IA'),

Part 1 of the IA applies to the interpretation of the CMSA (which was enacted after 18 May 1967). Section 17A in Part 1 of the IA provides as follows:

> *Regard to be had to the purpose of Act*
>
> 17A *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.* (Emphasis added.)

In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97 at pp 105–106, 108–109 and 130, the Federal Court applied s 17A of the IA and gave a purposive interpretation of the Palm Oil Research and Development Act 1979.

Based on s 17A of the IA, *Vlok*'s case and *Capricorn Diamonds Investment*, I adopt a purposive construction of ss 222 and 224 of the CMSA, namely such compulsory acquisition provisions have a legislative objective of preventing minority shareholders holding less than nine-tenths in the nominal value of the offer shares (excluding IB shares held by the defendant) from 'greenmailing' the defendant. Accordingly, the defendant's application is supported by the above purposive interpretation of ss 222 and 224 of the CMSA. To disallow the defendant's application will be tantamount to allowing the minority shareholders in IB to hold the defendant (who had obtained 95.249% of the offer shares (excluding IB shares held by the defendant) on 10 April 2015) to ransom.

SUBMISSION OF PARTIES

[41] Mr Cheong represented En Amin, Pn Nor'aini and Mr Yau in the first and second OS. Mr Chan submitted as follows in support of the first and second OS:

(a) the defendant's compulsory acquisition of the IB shares in this case was 'repugnant' to art 13(1) of the FC for the following reasons:

  (i) the defendant had failed to satisfy the threshold requirement of nine-tenth of the offer shares stipulated in s 222(1) of the CMSA (which excluded IB shares held by the defendant). As such, the defendant's s 222(1) Notice was defective and should be set aside *ex debito justitiae*; and

  (ii) the defendant had contravened s 67 of the CA by relying the 2015 dividend in the defendant's revised offer;

(b) shares fall within the meaning of 'goods' in s 2 of the SGA. Section 5(1) of the SGA requires the dissenting shareholders to accept the takeover offer by the defendant before the defendant can acquire IB shares belonging to the dissenting shareholders;

(c) the defendant's takeover of IB was mala fide. Encik Amin, Pn Nor'aini and Mr Yau had to sell partially their direct and indirect interest in IB due to shortage of time and the 'threat' that IB could be delisted from Bursa; and

(d) this court should intervene in this case because the defendant's proposed terms of acquisition were 'manifestly not fair on the face of the record'. Mr Cheong had relied on MASSB's view that the defendant's revised offer was 'not fair but reasonable'. According to Mr Cheong, the 'true' value of IB's share was RM3.66 per share. IB's BOD had discussed the 'Coal Blending Facility' plan ('CBF plan'). The implementation of JTUA 3 and the CBF plan would increase the future earnings of IB and this would consequentially enhance the value of IB's shares. Accordingly, En Amin, Pn Nor'aini and Mr Yau had been deprived of their investment benefit in IB's shares.

[42] Mr Cheong relied on the following cases:

(a) the High Court case of *Hee Cheng v Krishnan* [1955] 1 MLJ 103;

(b) the Federal Court's judgment in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94;

(c) the Court of Appeal case of *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 ; [1997] 1 AMR 120;

(d) the High Court's decision in *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6 which had been upheld by the Court of Appeal in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487;

(e) the unreported judgment of the Court of Appeal in *Ng Chin Siu & Sons Rubber Estate Sdn Bhd v Pentadbir Tanah Hilir Perak & Anor* Civil Appeal No A-01–794 of 2010 , Court of Appeal;

(f) the Supreme Court case of *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449;

(g) the English Court of Appeal's decision in *Wallersteiner v Moir* [1974] 1 WLR 991; and

(h) the judgment of the Federal Court of Australia in *Milburn v Pivot Ltd* [1997] 25 ACSR 237. It is to be noted that the apex court in Australia is the High Court.

[43] In support of the third OS, En Mohd Izral bin Mohamed Khairi ('En Izral'), learned counsel for Mr Chan, had raised some grounds which were similar to those advanced by Mr Cheong. I will now refer to the following

additional grounds to challenge the defendant's compulsory acquisition of IB's shares as contended by En Izral:

(a) the deponents of the defendant's affidavits, En Fazlur and En Izhar bin Ismail ('En Izhar'), were not directors of the defendant and had no authority from the defendant's BOD to affirm those affidavits on behalf of the defendant. Encik Fazlur had no authority to affirm any affidavit on behalf of the defendant's BOD when allegations had been made against the defendant's directors regarding the personal knowledge and personal liability on the part of the defendant's directors. Accordingly, the defendant had no valid affidavit to oppose the third OS;

(b) En Fazlur could not affirm the defendant's SD as En Fazlur was not a director of the defendant;

(c) when the defendant's s 222(1) Notice was issued, the defendant had not acquired nine-tenths in nominal value of the offer shares as required by s 222(1) of the CMSA. This was because of the two following reasons:

(i) the defendant could not prove that 6.31% of the IB's shares acquired by the defendant, did not exceed the revised offer price; and

(ii) the defendant could not include IB's shares which had already been held by the defendant in the calculation of the 90% threshold requirement as laid down in s 222(1) of the CMSA;

(d) En Fazlur had breached his fiduciary duty to IB by signing the defendant's s 222(1) Notice as En Fazlur had placed himself in a position of conflict of interest. Section 131 of the CA estopped En Fazlur from proceeding further in the defendant's compulsory acquisition of IB's shares;

(e) the defendant had concealed a material fact regarding the JTUA 3 in the defendant's offer;

(f) the defendant did not disclose price-sensitive information regarding JTUA 3. Hence, the defendant has committed insider trading when the defendant acquired IB's shares; and

(g) s 222 of the CMSA was void under art 13(2) of the FC because s 222 of the CMSA did not provide adequate compensation for compulsory acquisition of shares.

[44] Reliance had been placed by En Izral on the following cases:

(a) the High Court case of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49;

(b) the Federal Court's judgment in *Shanta Holdings Sdn Bhd v Golden*

Uni-Consortium [2008] 2 MLJ 609;

(c) the Court of Appeal's decision in *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440;

(d) the Federal Court case of *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66; and

(e) the High Court's judgment in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

[45] Mr Suhendran submitted, among others, as follows in opposing the 3 OS:

(a) En Izhar had been authorised by the defendant's BOD to affirm affidavits on the defendant's behalf by way of para 2(a) of an extract of the minutes of the meeting of the defendant's BOD on 26 September 2012 (the defendant's BOD meeting dated 26 September 2012);

(b) the defendant had adduced affidavit evidence that the 6.31% shares in IB had been acquired by the defendant in the market during the offer period at a price which did not exceed the revised offer price; and

(c) dividends declared by IB could be used to purchase the offer shares. In any event, there was affidavit evidence by the defendant that the defendant did not use the 2015 dividend to acquire the offer shares.

[46] Mr Suhendran had cited an impressive array of cases from Australia, England, New Zealand, Canada and South Africa.

AUTHORITY OF EN FAZLUR AND EN IZHAR

[47] I am satisfied that by reason of the defendant's BOD resolution dated 9 January 2015, En Fazlur had the authority to act for the defendant in respect of the following matters:

(a) to issue the defendant's s 222(1) Notice;

(b) to affirm the defendant's SD; and

(c) to affirm the defendant's affidavits in these 3 OS.

[48] I am not able to accept the submission that only a director of the defendant can issue the defendant's s 222(1) Notice and affirm the defendant's SD. This is because s 222(1) of the CMSA does not provide that only a director of the 'offeror' (defined in s 216(1) of the CMSA as 'a person who makes or proposes to make a takeover offer') can issue a notice under s 222(1) of the CMSA and affirm a SD as required by that provision.

[49] The defendant's BOD meeting dated 26 September 2012 had authorised En Izhar to affirm affidavits on the defendant's behalf. Hence, there is no issue regarding the lack of authority on the part of En Izhar to affirm affidavits on the defendant's behalf in this case.

THERE IS NO MATERIAL OMISSION BY THE DEFENDANT

[50] Section 221 of the CMSA and s 41 of the MCTM provide as follows:

CMSA

False or misleading documents, information, etc

221(1) *Where any document or information is required to be submitted to the Commission in relation to a* take-over offer, merger or *compulsory acquisition*:

(a) *an acquirer, an offeror or a person making a compulsory acquisition* or effecting a merger, *its officers or associates*;

(b) an offeree, its officers or associates;

(c) a financial adviser or an expert; or

(d) any other person, shall not —

(A) submit or cause to be submitted any document or information that is false or misleading;

(B) *provide or cause to be provided any document or information from which there is material omission*; or

(C) engage in conduct that he knows to be misleading or deceptive or is likely to mislead or deceive.

(2) It shall be a defence to a prosecution or any proceeding for a contravention of subsection (1) if it is proved that the defendant, after making enquiries as were reasonable in the circumstances, had reasonable grounds to believe, and did until the time of the provision of the document or information or engaging in the conduct was of the belief that:

(a) the document or information was true and not misleading;

(b) the omission was not material;

(c) there was no material omission; or

(d) the conduct in question was not misleading or deceptive.

(3) *A person who contravenes subsection (1) commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years and shall also be liable to a fine not exceeding three million ringgit*.

MCTM

Requirement to disclose material information

41(1) *Where a person who circulates or provides any information or document required to be circulated or provided under this Code becomes aware that the information or document previously circulated or provided*:

(a) contains a material statement which is false or misleading;

(b) *contains a statement from which there is a material omission*; or

(c) does not contain a statement relating to a material development, *before an offer closes or lapses, he shall —*

(i) *disclose such fact to the Commission in writing*; and

(ii) *make an announcement to —*

(A) the public by way of a press notice; and

(B) the relevant stock exchange in Malaysia in writing if the securities of the offeree or offeror are listed on the relevant stock exchange in Malaysia,

of such matters which are necessary to correct the false or misleading matter or the omission.

(2) The disclosure and announcement referred to in subsection (1) shall be made before 9 a.m. on the next market day. (Emphasis added.)

[51] Messrs CA's letter dated 8 June 2015 had alleged that the defendant's offer contained a material omission regarding the fact that on 8 January 2005, IB had already agreed with the defendant to sign JTUA 3. As such, Messrs CA's letter dated 8 June 2015 averred that the defendant had breached ss 221(1)(a) and (B) of the CMSA. I am not able to accept this allegation for the following reasons:

(a) to constitute an offence under ss 221(1)(a) and (B) of the CMSA, there should be proof of the following elements of the offence:

(i) the defendant had submitted documents or information which were required to be submitted to the securities commission ('SC') in relation to the defendant's compulsory acquisition of IB shares belonging to the dissenting shareholders ('the defendant's submission'); and

(ii) the defendant's submission contained a material omission in respect of JTUA 3.

No evidence had been adduced in these 3 OS regarding the defendant's submission. As such, this court could not decide whether there was any omission in the defendant's submission, let alone a material one;

(b) whether an omission in the defendant's submission was material or not, must be decided in relation to the date of the defendant's submission. I rely on Mohamed Apandi Ali J's (as he then was) judgment in the High Court case of *Public Prosecutor v Tan Siew Hui* [2008] MLJU 81 ; [2008] 8 CLJ 142, at p 147, as follows:

> [5] The salient point to be noted from the above letter is that it encloses 'the revised Pink form allocation list'. In the second sentence of the 2nd para of the letter, it stated that: 'The amendments to the allocation list have been highlighted for your reference'. There is no indication anywhere in the charge, that these amendments as highlighted by CIMB also constituted part of the false information. In the absence of such indication, *based on the revised Pink form allocation list, it must be observed that the list was as at 27 December 1996. The subject-matter of false information is therefore the revised list as at 27 December 1996. The falsity or otherwise of the said revised list must be construed at that material time, namely on 27 December 1996.* (Emphasis added.)

Tan Siew Hui concerned a charge under the then s 32B(1) of the Securities Commission Act 1993 ('the SCA'). As s 32B(1) of the SCA was similar to s 221 of the CMSA, resort could be made to *Tan Siew Hui*. The High Court's judgment in *Tan Siew Hui* had been affirmed by the Court of Appeal but there was no written judgment by the Court of Appeal. Based on *Tan Siew Hui*, there must be proof that there was a material omission regarding the JTUA 3 on the date of the defendant's submission. No such evidence had been adduced in these 3 OS. In fact, there was also no evidence of any agreement between IB and the defendant on 8 January 2015;

(c) JTUA 3 was executed by LBTSB and TNB Manjung 5 on 25 February 2015. As JTUA 3 was deemed a RPT under the LR, JTUA 3 was required to be approved by IB's EGM on 27 March 2015. There was always the possibility that IB's EGM might not approve JTUA 3. Accordingly, I do not see how any information regarding JTUA 3 could be material on 8 January 2015 or on any date before the convening of the EGM to decide to approve JTUA 3 or not; and

(d) whether the defendant had committed an offence under s 221 of the CMSA or otherwise, depended on SC's investigation into such a matter and the public prosecutor's discretion to issue a written consent to prosecute the defendant under s 375(1) of the CMSA. Even if it was assumed that the defendant had committed an offence under s 221 of the CMSA (there was no evidence of such an offence in this case), this did not necessarily invalidate the defendant's compulsory acquisition of IB shares

belonging to the dissenting shareholders. I will discuss later in this judgment on the court's discretionary power to decide the 3 OS under s 224(1)(a) and (b) of the CMSA and whether a material omission may be considered in the exercise of such a discretionary power.

[52] The defendant had not breached s 41(1)(b) of the MCTM because there was no evidence that when the defendant circulated or provided information or document required to be circulated or provided under MCTM, there was any material omission and the defendant knew of such a material omission.

SECTION 67 OF THE CA DID NOT APPLY IN THIS CASE

[53] Section 67 of the CA provides as follows:

67 Dealing by a company in its own shares, etc.

(1) Except as is otherwise expressly provided by (CA) *no company shall give, whether directly or indirectly* and whether by means of a loan, guarantee or the provision of security or otherwise*, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company* or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

(2) Nothing in subsection (1) shall prohibit —

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company or a subsidiary of the company, including any director holding a salaried employment or office in the company or a subsidiary of the company; or

(c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) If there is any contravention of this section, the company is, notwithstanding Section 369, not guilty of an offence but each officer

who is in default shall be guilty of an offence against (CA).
Penalty: Imprisonment for five years or one hundred thousand ringgit or both.

(4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the Court specifies, any such order may be enforced as if it were a judgment of the Court.

(5) The power of a Court under Section 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) from the liability to have such an order made against him.

(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on the account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section. (Emphasis added.)

[54] I am of the view that the defendant had not breached s 67(1) of the CA in this case. Firstly, there was no evidence that IB had provided any financial assistance to the defendant for the defendant's compulsory acquisition of the dissenting shareholders' shares in IB. The defendant's revised offer merely stated that the holders of the offer shares were entitled to receive the 2015 dividend. The 2015 dividend, in my opinion, did not constitute 'financial assistance for the purpose of or in connection with' the defendant's compulsory acquisition of IB shares belonging to the dissenting shareholders within the meaning of s 67(1) of the CA.

[55] Secondly, I accept the submission by Mr Suhendran that dividends issued by a company to a shareholder of the company, may be used by that shareholder to acquire shares in the same company. I refer to the following cases cited by Mr Suhendran in support of this submission:

(a) s 62(1) of the New Zealand's Companies Act 1955 ('the CA 1955 (NZ)') was similar to our s 67(1) of the CA. It is to be noted that CA 1955 (NZ) has now been repealed by New Zealand's Companies Act 1993 ('the CA 1993 (NZ)'). The present s 76 of the CA 1993 (NZ) regarding financial assistance by companies for the purpose of the purchase of the companies' own shares is different from our s 67(1) of the CA. I refer to the following two New Zealand cases:

(i) in *Re Wellington Publishing Company Ltd* [1973] 1 NZLR 133 at pp 136–137, Quilliam J held as follows in the Supreme Court:

> *There is no doubt that the words of s 62 (CA 1955 (NZ)) are intended to have a wide application. This does not mean that they are to have unlimited application. Nor does it mean that they are to be given any strained or unnatural interpretation. The purpose of the section would seem to be the protection of minority shareholders and creditors*. If, therefore, a transaction in question is likely to detract from that protection then the words of the section may the more readily be regarded as extending to embrace that transaction.
>
> *I think the first approach should be to look at the words of the section and see whether, giving those words their normal and popular meanings, they appear to extend to the declaration and payment of a dividend. I find it very difficult to say that this is the case. It is necessary first to eliminate the words 'loan, guarantee, the provision of security'. By no process of reasoning can those words be regarded as including a dividend. There remain the words 'or otherwise' which undoubtedly have the widest application and will presumably include transactions of any kind. Any transaction which is being considered, however, must be of a kind which gives 'any financial assistance for the purpose of or in connection with a purchase' of shares. The expression 'financial assistance' is an indefinite one and it is beyond normal experience to regard that expression as applying to the payment of a dividend. The payment of a dividend is part of the normal functions of a company, and indeed, in the final analysis, is probably as much the reason for the company's existence as is the earning of profits the reason for an individual trader being in business. To be more precise, a dividend must be regarded as first and foremost a return on an investment. In the customary usage of words the payment by a company of a dividend to a shareholder is not to be regarded as giving financial assistance to that shareholder*.
>
> *I think it is beyond doubt that the payment of a dividend is not something which will ordinarily be regarded as the giving of financial assistance …* (Emphasis added.)

It is to be noted that at the time of the decision in *Re Wellington Publishing Company Ltd*, the Supreme Court was a court of first instance and the Privy Council was the apex court in New Zealand; and

(ii) Mahon J decided as follows in the Supreme Court in *Coleman v Myers* [1977] 2 NZLR 225 at p 287:

> *It is undoubtedly a common practice for the successful bidder in a take-over operation to rely upon dividends ultimately declared in his favour by the offeree company to recoup himself for the whole or part of the purchase price of the shares. In principle, it seems impossible to suggest that dividends paid out of earned profits to the owner of a company may not be put to any purpose he likes, including repayment of whatever loans he had to acquire in order to buy the shares. Yet it was the opinion of Jenkins Committee that such a procedure would be in breach of the English equivalent of s 62: cf Weinberg on Take-overs*

and Mergers (3rd ed) para 1807. A contrary view, however, was taken by Quilliam J in Re Wellington Publishing Co Ltd [1973] 1 NZLR 133. I have mentioned previously that this litigation was pending at the time when the plans were being formulated for the acquisition by Mr AD Myers of the shares in C & E. Reasons for judgment in the case were delivered on 12 June 1972. The Wellington Publishing Co Ltd made an offer for the issued capital of Blundell Brothers Ltd, the consideration being an issue of the offeror's shares together with a cash payment, and the Wellington Publishing Co Ltd intended to pay the cash out of a dividend to be declared by Blundell Brothers Ltd after successful acquisition of the controlling interest by the offeror. *Quilliam J declined to accept that a contravention of s 62 was involved in the declaration of that dividend and its subsequent use by the recipient. He viewed the dividend as 'first and foremost a return on an investment' and not something which would be regarded in the ordinary way as the giving of financial assistance to the person entitled to the dividend. The learned judge recognised that the words of the section were intended to have a wide application but, as he said, this did not mean that their application was to be unlimited or that the words were meant to be given any strained or unnatural construction. In the final result, as already indicated, the judge based his decision on the proposition that the payment of a dividend is part of the normal functions of a company and that the use of the dividend in the case then under consideration could not for that reason be regarded as the provision by the company of financial assistance to the offeror. I respectfully concur with that decision and with its supporting reasoning.* (Emphasis added.)

On appeal, the New Zealand Court of Appeal had unanimously reversed Mahon J's decision in *Coleman* but Casey J held as follows in the Court of Appeal, at pp 377–378:

The other main attack by the appellants was based on infringement of s 62 of the Companies Act 1955 prohibiting financial assistance by a company for purchase of its shares. First, it was contended that the scheme of take-over involved from its outset the declaration of dividends to pay for the shares acquired, which fell squarely within the section. *Mahon J reviewed the purpose of s 62 at some length and came to the conclusion that it did not apply to dividends in this situation. He followed the reasoning of Quilliam J in Re Wellington Publishing Co Ltd* [1973] 1 NZLR 133 that, while the words of the section were wide, they were not unlimited. Payment of a dividend is a normal function of a company, and its use to pay for the shares in that case could not be regarded as the provision of financial assistance to buy them. The distinction between the circumstances of that and the present case is that there the dividend was being paid out of revenue reserves of the offeree company. Quilliam J placed considerable stress on payment of dividends as a 'normal function' of the company:

...

I think there can be no quarrel with the judge's views as expressed in

dealing with the distribution of earned profits held in the revenue reserve in this way. But what is to be said of the liquidation of major assets of the company and (together with capital reserves) their distribution by way of dividend, as part of a total plan for the acquisition of the shares? It was rightly accepted by Mahon J that the court can go beyond the form of the transactions and look at the substance in dealing with s 62. Prior to Mr AD Myers' decision to attempt 100 percent ownership, the company envisaged the disposal of at least the cash reserves by way of capital distribution, and it is now evident that all the property assets were free, and not required for the new direction its business took after the deal with New Zealand Breweries Ltd. Accordingly, it cannot be said that the capital dividend prejudiced the company or its creditors or shareholders at the time it was paid, so that the evils contemplated by s 62, and referred to in the judgment of Mahon J are absent. *Adopting the reasoning of Quilliam J in the Willington Publishing Co Ltd case, I incline to the view that such a dividend is 'normal' for a company in this situation, with ample free assets to dispose of, and the distribution does not amount to that informal reduction of necessary capital, which is one of the things the section is designed to avoid.* (Emphasis added.)

Woodhouse and Cooke JJ (the other two members of the Court of Appeal in *Coleman*) did not express any view on whether s 62 of the CA 1955 (NZ) prohibited a company's shareholder from utilising the dividend issued by the company to purchase shares in that company; and

(b) s 67 of the then Companies Act 1961 of Queensland is similar to our s 67 of the CA and this provision has been construed in *Rossfield Group Operations Pty Ltd v Austral Group Ltd* (1980) 5 ACLR 290. In *Rossfield Group Operations* at pp 297–298, Connolly J gave the following judgment in the Queensland Supreme Court:

There is authority for the proposition that the use by the offeror company of the revenue reserves of the target company by way of dividend and the application of that dividend to payment for the shares of the target company does not infringe the equivalent of s 67. This occurred in Re Wellington Publishing Co Ltd [1973] 1 NZLR 133 ...

I was referred to a passage in the report of the Jenkin's Committee in 1962 which instanced as unobjectionable, the following case:

A borrows the money to buy control of company B and then causes company B to pay a dividend, which company B can properly do, and uses the dividend to repay the loan.

We see no objection to this transaction. The payment of a dividend properly declared is no more than the discharge of a liability and we cannot see why the discharge by a company of a lawful liability should be regarded as giving financial assistance to the creditor. Such a payment cannot prejudice the rights of the creditors, while minority shareholders will directly benefit from it.

But then it is said that the moneys provided by AMH in the incorporation of

Austral Group and the working up of the scheme for the defence of AMH against the plaintiffs' offer, involving as they did the incorporation of a vehicle for the acquisition of the shares amounted to financial assistance in connection with their purchase. This it seems to me, is as high as the proposition can be put and in my judgment it is self evidently incorrect. *For the payments to be struck down by s 67(1) they must be within the description financial assistance for the purpose of or in connection with, a purchase or subscription made or to be made for shares of the company. Section 67(1) essentially is directed to the preservation of the capital of the company. The fact that the expenditure may lead to the coming into existence of a new corporation which in turn may offer to purchase the shares of the first mentioned company, cannot make the expenditure one for the purpose of or in connection with a purchase of its shares. It is, in my judgment, nothing to the point to say that when the expenditure is made the company has in view the making of such purchases by the newly formed corporation.* (Emphasis added.)

I accept the reasoning stated in *Re Wellington Publishing Company Ltd*, *Coleman* (by Mahon J in the Supreme Court and by Casey J in the Court of Appeal) and *Rossfield Group Operations* as applicable in the interpretation of our s 67(1) of the CA.

THE DEFENDANT HAD NOT COMMITTED INSIDER TRADING

[56] Sections 184 and 188 of the CMSA provide as follows:

Information generally available

184(1) *For the purposes of this Subdivision, information is generally available if the information has been made known in a manner that would, or would tend to, bring it to the attention of reasonable persons who invest in securities of a kind whose price or value might be affected by the information, and since it was so made known, a reasonable period for it to be disseminated among, and assimilated by, such persons has elapsed.*

(2) The information referred to in subsection (1) includes information that consists of deductions or conclusions made or drawn from such information.

Prohibited conduct of person in possession of inside information

188(1) *A person is an 'insider' if that person —*

(a) *possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities*; and

(b) *knows or ought reasonably to know that the information is not generally available.*

(2) *An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —*

(a) *acquire* or dispose of, or *enter into an agreement for or with a view to the acquisition* or disposal *of such securities*; or

(b) *procure, directly or indirectly, an acquisition* or disposal of, *or the entering into an agreement for or with a view to the acquisition* or disposal *of such securities*.

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to —

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

(4) A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(5) The Minister may make regulations in respect of any particular class, category or description of persons or any particular class, category or description of transactions, relating to securities, to whom or which this section does not apply. (Emphasis added.)

[57] I do not find any evidence of insider trading by the defendant in this case. My reasons are as follows:

(a) the defendant was not an 'insider' who possessed information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of IB shares within the meaning of s 188(1)(a) of the CMSA. This was due to the following three reasons:

(i) there was no evidence that the defendant or TNB Manjung 5 had agreed to execute JTUA 3 on 8 January 2015. In other words, there was no proof that on 8 January 2015, the defendant had any information regarding JTUA 3 which was not generally available to the investing public;

(ii) before the defendant's revised offer was made on 25 February 2015, information regarding JTUA 3 had already been disclosed in IAL dated 16 February 2015 and the IAL dated 16 February 2015 had been included in the IAC dated 16 February 2015. The IAC dated 16 February 2015 had been distributed to all of IB's shareholders. It

was therefore clear that as from 16 February 2015, information regarding JTUA 3 was information which was generally available if the information had been made known in a manner that would, or would tend to, bring it to the attention of reasonable persons who invested in IB shares whose price or value of IB shares might be affected by such information, and since it was so made known, a reasonable period for such information to be disseminated among, and assimilated by, such persons had elapsed (as understood in s 184(1) of the CMSA); and

(iii) IB's public announcement on 25 February 2015 (JTUA 3) had clearly informed the public regarding the execution of JTUA 3. *Kinwat Holdings Pty Ltd v Platform Pty Ltd* (1982) 6 ACLR 398 was a case on s 128(1) of the then Securities Industry Code (Queensland) which provided as follows:

> A person who is, or at any time in the preceding 6 months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his so being, or having been, connected with that body corporate he is in possession of information that is not generally available but, it it were, would be likely materially to affect the price of those securities.

In *Kinwat Holdings Pty Ltd* at p 400, Connolly J decided as follows in the Queensland Supreme Court:

> On Tuesday 5 January 1982, *Koitaki Ltd (of which Platform is a wholly owned subsidiary) wrote to the Sydney Stock Exchange disclosing the allegations as to undervaluation of assets which are made by Mr G D Watkins in an affidavit in support of this application. This letter was obviously published to the press for the Courier Mail newspaper of 6 January 1982 in a news story sets out the information in substantial detail as well as drawing attention to the fact that the affidavit has been made a matter of public record. Now it may be that the news story on its own is sufficient to make the information in the possession of the four common directors generally available but it is unnecessary to decide this point. In my judgment it is beyond question that the news story, coupled with the filing of Mr Watkins' affidavit and the despatch by Koitaki of its letter to the Sydney Stock Exchange, taken in conjunction, have this effect*. Mr Jackson argued that because, in addition to the valuations of the relevant properties there were discussions amongst the directors, the terms of which are not disclosed by the affidavit, it cannot be said that all the information available to the directors has yet become generally available. There are, in my judgment, two answers to this proposition. First, discussion of information amongst the directors does not necessarily or ordinarily involve further information. Second and more important, it is for the applicants to make out a case for relief. They have nominated, as they

were bound to do, the information they claim to be secret. If the result is that the information has now become public, they cannot be heard to seek relief on the footing that there may be other information which they do not specify in the same category.

It follows that in my opinion no breach of s 128(1) is contemplated and the motion must be refused. (Emphasis added.); and

(b) if the defendant was not an 'insider' under s 188(1) of the CMSA, the defendant was not subject to the prohibition imposed by ss 188(2)(a) and (b) of the CMSA. Accordingly, the defendant could not have committed insider trading in respect of the information regarding JTUA 3.

SGA DOES NOT APPLY TO COMPULSORY ACQUISITION OF SHARES

[58] I am not able to accept Mr Cheong's contention that SGA applies to compulsory acquisition of shares of public listed companies. This is due to the following reasons:

(a) the title to SGA states that SGA is an Act of Parliament which relates to 'sale of goods' (which includes sale of shares). It is clear that SGA does not apply to compulsory acquisition of shares;

(b) s 64(1) of the SGA provides that nothing in SGA 'shall affect or be deemed to affect any rule of law, not inconsistent with' SGA. There is nothing in SGA which provides for, let alone prohibits, the compulsory acquisition of shares; and

(c) when Parliament enacted ss 222 and 224 of the CMSA regarding compulsory acquisition of shares in public listed companies, Parliament is presumed to know existing law, namely SGA. In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 754, Gopal Sri Ram JCA (as he then was) held as follows in the Court of Appeal —

> Now, *there is an important presumption when it comes to construing a legislative enactment. It is this. Parliament is presumed to know the law at any time it exercises its legislative authority upon a subject. In this context, Parliament is irrebuttably presumed to have known the law relating to options in a tenancy or lease.* (Emphasis added.)

As the Legislature was presumed to have known of SGA when ss 222 and 224 of the CMSA were enacted in 2007, ss 222 and 224 of the CMSA would prevail over SGA.

A REQUIREMENTS FOR COMPULSORY ACQUISITION OF LITIGATING DISSENTING SHAREHOLDERS' SHARES

[59] Upon a reading of ss 222(1), (2), (3), (7), 224(1) and (2) of the CMSA, the defendant had to fulfil the following requirements for a valid compulsory B acquisition of IB shares belonging to the litigating dissenting shareholders:

(a) within four months from the date of the defendant's offer (30 January 2015), the defendant's revised offer had been accepted by IB shareholders of 'not less than nine-tenths in the nominal value of those shares' ('90% C requirement') — s 222(1) of the CMSA. The computation of the 90% requirement could not include shares already held at the date of the takeover offer (30 January 2015) by the defendant and persons acting in concert with the defendant;

(b) within two months from the date of achieving the 90% requirement, the D defendant's s 222(1) Notice (to acquire the shares of the dissenting shareholders) should be given with a copy of the defendant's SD to all the dissenting shareholders — s 222(1) of the CMSA;

(c) if a dissenting shareholder gives a written demand for the requested E information under s 222(2) of the CMSA within one month from the date of the defendant's s 222(1) Notice, the defendant should give the requested information and could only acquire the dissenting shareholder's shares after 14 days from the date of posting of the required information — s 222(2) of the CMSA; *and*

F (d) upon the filing of s 224(1) Suit:

(a) the defendant could not acquire the litigating dissenting shareholder's shares until the disposal of the s 224(1) Suit — s 224(2) of the CMSA; *and*

G (bi) if the court orders under s 224(1)(a) of the CMSA that the defendant is not entitled and is not bound to acquire the shares of the litigating dissenting shareholder, the defendant could not compulsorily acquire the litigating dissenting shareholder's shares; *or*

H (bii) if the court has ordered terms of the compulsory acquisition of the litigating dissenting shareholder's shares which are different from the defendant's revised offer under s 224(1)(b) of the CMSA ('court's order on acquisition terms'), the I defendant can only acquire the litigating dissenting shareholder's shares in accordance with the court's order on acquisition terms; *or*

(biii) if the court dismisses the s 224(1) Suit, the defendant can proceed to acquire compulsorily the litigating dissenting

shareholder's shares as per the terms of the defendant's revised offer — s 222(1), (3) and (7) of the CMSA. A

Whether the defendant had fulfilled 90% requirement

[60] I am satisfied that the defendant has adduced affidavit evidence to satisfy the 90% requirement in this case. According to En Fazlur's affidavit affirmed on 13 November 2015 and filed in the third OS: B

(a) IB shares held by the defendant on the date of the defendant's offer = 22.12%; C

(b) IB shares which were not held by the defendant on the date of the defendant's offer = 77.88% (100%–22.12%);

(c) IB shares acquired by the defendant = 74.18% (67.87% (IB shares acquired by way of acceptances of the defendant's revised offer) + 6.31% (IB shares acquired or agreed to be acquired by the defendant other than by way of acceptances of the defendant's revised offer)); and D

(d) percentage of IB shares acquired by the defendant (excluding IB shares held by the defendant on the date of the defendant's offer) = 95.249% (Total IB shares which had been acquired (74.18%) ÷ (IB shares which are not owned by the defendant) x 100%) ((74.18% ÷ 77.88%) x 100). E

[61] I must point out that the defendant had adduced affidavit evidence in this case to prove that the defendant had acquired 6.31% shares in IB in the market during the offer period at prices which did not exceed the revised offer price. F

[62] The above evidence regarding the defendant's fulfilment of the 90% requirement is corroborated by IB's announcement to Bursa on 10 April 2015 that the 90% requirement had been met by the defendant. Furthermore, Messrs KA had sent a letter dated 28 October 2015 to Bursa regarding the defendant's achievement of the 90% requirement. If the defendant had not attained the 90% requirement, Bursa would have certainly taken action against both the defendant and IB. G H

The defendant's fulfilment of requirements for compulsory acquisition of IB shares belonging to litigating dissenting shareholders (besides s 224(1) Suit)

[63] Besides the s 224(1) Suit (which will be discussed below), the defendant had satisfied the following requirements so as to enable the defendant to acquire compulsorily the IB shares of the litigating dissenting shareholders: I

(a) the 90% requirement had been achieved within the four month time period as stated in s 222(1) of the CMSA;

(b) the defendant's s 222(1) Notice with the defendant's SD had been given within the two month period as provided in s 222(1) of the CMSA.

At this juncture, I should address En Izral's contention that En Fazlur had breached his fiduciary duty to IB by signing the defendant's s 222(1) Notice and hence, En Fazlur had placed himself in a position of conflict of interest. According to En Izral, s 131 of the CA estopped En Fazlur from proceeding further in the defendant's compulsory acquisition of IB shares.

Firstly, I do not see any conflict between the fiduciary and statutory duties owed by En Fazlur to IB on the one hand, and En Fazlur's personal interest on the other hand. This is because it was the defendant (not En Fazlur) which acquired IB's shares. It is trite company law that by virtue of s 16(5) of the CA, the defendant is a legal person which is separate from En Fazlur. Secondly, s 131(1) of the CA only applies to a 'contract or proposed contract' with IB in which En Fazlur is interested, either directly or indirectly. As En Fazlur was not interested, directly or indirectly, in any contract or proposed contract with IB, there was thus no room to apply s 131(1) of the CA; and

(c) the litigating dissenting shareholders had demanded for the requested information and the defendant had furnished the requested information to the litigating dissenting shareholders.

SECTION 224(1) SUIT

Whether court can extend one month time period in s 224(1) of the CMSA

[64] Section 224(1) of the CMSA has expressly provided for the litigating dissenting shareholders to file the 3 OS within one month from the date of the defendant's s 222(1) Notice (22 May 2015). As such, the litigating dissenting shareholders should have filed their s 224(1) Suits on or before 22 June 2015. Except for the third OS (which was filed on 16 June 2015), the first and second OS (filed on 1 July 2015 and 30 June 2015 respectively) had been filed beyond the one month time period as stipulated in s 224(1) of the CMSA. There had been a delay of eight days by En Amin and Pn Nor'aini (in filing the first OS) while Mr Yau had been seven days' late in filing the second OS.

[65] The first and second OS had prayed for an extension of time to proceed with the s 224(1) Suits.

[66] The question that arises is whether this court has the power to extend time for the first and second OS to proceed on their merits.

[67] Mr Suhendran had strongly objected to an extension of time to be granted to En Amin, Pn Nor'aini and Mr Yau. According to Mr Suhendran:

(a) *Vlok*'s case has decided that the court has no discretion to extend time to challenge a compulsory acquisition of shares. It was held in *Vlok*'s case, at para 110, as follows:

> 110. *I am therefore of the view that, despite the power of the principles relied upon by the plaintiffs, and despite the fact that the words of the subsection itself are concededly neutral and contain no express exclusion of a power to condone, the exclusion of a power to condone must be implied into the subsection by way of necessary implication*. (Emphasis added.);

(b) a purposive interpretation of s 224(1) of the CMSA, namely to avoid the possibility of the litigating dissenting shareholders greenmailing the defendant, supports a construction that the one month time period is mandatory and cannot be extended by the court; and

(c) in an unreported judgment of O'Bryan J in the Supreme Court of Victoria in *Re Freeland (Singapore) Pte Ltd* 1977 CC No 9931 (30 November 1977), an extension of time was given to dissenting shareholders to file an application to court under the then s 180X(6) of the Companies Act 1961 of Victoria because the dissenting shareholders had shown 'a reasonable prospect of succeeding'. Mr Suhendran submitted that the first and second OS had no reasonable prospect of success.

[68] I am not able to accede to the aforesaid submission by Mr Suhendran. This is because of two reasons. The first reason is the existence of para 8 of the Schedule to the Courts of Judicature Act 1964 ('the CJA'). Paragraph 8 provides as follows:

> *Time*
>
> 8 *Power to enlarge* or abridge *the time prescribed by any written law for* doing any act or *taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed*;
>
> *Provided that this provision shall be without prejudice to any written law relating to limitation.* (Emphasis added.)

[69] Section 25(2) of the CJA provides that the High Court shall have additional powers set out in the Schedule to the CJA (which includes para 8).

[70] *Vlok*'s case can be easily distinguished from the first and second OS on the ground that para 8 provides a discretionary power for Malaysian courts to extend time. The wording in s 224(1) of the CMSA does not indicate that the one month time period to file a s 224(1) Suit is mandatory. Nor does s 224 of the CMSA provide for a limitation period to file a s 224(1) Suit. Hence, the proviso to para 8 does not apply to bar En Amin, Pn Nor'aini and Mr Yau from applying for extensions of time to proceed with the first and second OS.

[71] The second reason for deciding that the one-month time period in s 224(1) of the CMSA is not mandatory is because s 224(4)(b) of the CMSA empowers the court to order costs against a litigating dissenting shareholder for 'unreasonable delay' in filing the s 224(1) Suit. If the one month time period in s 224(1) of the CMSA is mandatory and the court has no discretion to extend such a time period, this will render redundant the first limb of s 224(4)(b) of the CMSA (unreasonable delay in filing the s 224(1) Suit). There is a canon of statutory construction that the Parliament does not legislate in vain — please see Augustine Paul FCJ's judgment in the Federal Court case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 at p 113 ; [2006] 5 AMR 585 at pp 600–601.

[72] I have not overlooked the main purpose of ss 222 and 224 of the CMSA, namely to avoid greenmailing of the new majority shareholder of the company by litigating dissenting shareholders. I fail to see how such a purposive interpretation of ss 222 and 224 of the CMSA is defeated by the existence of the court's discretionary power to extend time under para 8. Furthermore, the court should not be deprived of its power under para 8 unless there are clear words in s 224 of the CMSA to that effect. I am of the view that s 224 of the CMSA does not expressly or by necessary implication, oust the court's discretionary power to extend time under para 8.

[73] As this court has the discretionary power under para 8 to extend the one-month time period as provided in s 224(1) of the CMSA, the next issue which arises is whether the court's discretion should be exercised in favour of En Amin, Pn Nor'aini and Mr Yau in respect of the first and second OS. I exercise my discretion to extend time for the first and second OS to proceed on their merits because:

(a) the delay in the first and second OS was not excessive or inordinate. There was only a delay of eight days in filing the first OS while there was a mere delay of seven days in respect of the second OS;

(b) the delay in filing the first and second OS was understandable as this case involved novel questions of law regarding ss 222 and 224 of the CMSA. Hence, a considerable period of time and a certain degree of care were required to prepare and draft the first and second OS;

(c) there is no prejudice to the defendant if this court allows the first and second OS to proceed on their merits. Even if there is any prejudice occasioned to the defendant due to the delay in filing the first and second OS, such a prejudice can be compensated in costs to be paid to the defendant. I will discuss the question of costs later in this judgment; and

(d) if this court did not extend time in respect of the first and second OS, En Amin, Pn Nor'aini and Mr Yau would be irreparably prejudiced as the first and second OS would be dismissed on a mere technical ground of delay. Consequently, the IB shares owned by En Amin, Pn Nor'aini and Mr Yau would be compulsorily acquired by the defendant without the court hearing the merits of their grievances. It is in the interest of justice for the first and second OS to be decided on their merits.

[74] Whether the court exercises its discretion to extend time or not in a case, is dependent on the particular facts of that case. As such, cases on applications for extension of time, are not binding legal precedents from the view point of the *stare decisis* doctrine — please see Mahadev Shankar JCA's judgment in the Court of Appeal case of *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 at p 585 ; [1997] 1 CLJ 300 at p 306. The case of *Re Freeland (Singapore) Pte Ltd* (submitted by the defendant's learned counsel), in my respectful view, does not lay down any binding precedent on how the court should exercise its discretion to extend time or otherwise.

Burden of proof

[75] I accept the defendant's submission that the litigating dissenting shareholders have the legal burden to persuade this court to exercise its discretion under s 224(1)(a) or (b) of the CMSA. This is provided by ss 101(1), (2) and 102 of the Evidence Act 1950 and is consistent with the aforesaid purposive construction of ss 222 and 224 of the CMSA. The litigating dissenting shareholders are only required to satisfy this court to invoke its discretion under s 224(1) of the CMSA on a balance of probabilities.

What test should be applied under s 224(1) of the CMSA?

[76] Section 224(1) of the CMSA does not prescribe any specific test to be applied by the court in the exercise of its discretionary power under s 224(1)(a) or (b) of the CMSA.

Consent of litigating dissenting shareholders is not required

[77] I accept Mr Suhendran's contention that ss 222 and 224 of the CMSA do not require the consent of the litigating dissenting shareholders. If the litigating dissenting shareholders' consent is required, this will render nugatory the compulsory acquisition procedure as provided in ss 222 and 224 of the CMSA.

Section 155 of the United Kingdom's Companies Act 1929 ('the CA 1929 (UK)')

[78] Section 155 of the CA 1929 (UK) provided for compulsory acquisition of shares in companies.

[79] In *Re Hoare & Co Ltd* [1933] All ER Rep 105 at pp 106–107, Maugham J (as he then was) decided as follows in the English High Court:

> I have to deal with an application under s 155 of the Companies Act, 1929, the purport of which I have often had to apply with regard to schemes which have been approved by a large majority of shareholders some time before the commencement of the Act of 1929. *This, I think, is the first case I have had with regard to a quite recent scheme, and I will observe with regard to it that I am in the same difficulty as I was with regard to schemes approved by shareholders before the commencement of the Act, namely, that the legislature has not thought fit to indicate in any way, however remote, the grounds on which the court is to intervene and to make an order preventing the transferee company from acquiring the shares of the dissenting shareholders*.
>
> ...
>
> *I have some hesitation in expressing my view as to when the court should think fit to order otherwise. I think, however, the view of the legislature is that where not less than nine-tenths of the shareholders in the transferor company approve the scheme or accept the offer, prima facie, at any rate, the offer must be taken to be a proper one, and in default of an application by the dissenting shareholders, which includes those who do not assent, the shares of the dissentients may be acquired on the original terms by the transferee company. Accordingly, I think it is manifest that the reasons for inducing the court to 'order otherwise' are reasons which must be supplied by the dissentients who take the step of making an application to the court, and that the onus is on them of giving a reason why their shares should not be acquired by the transferee company*.
>
> One conclusion which I draw from that fact is that the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court. It has been called an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. *The other conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set tip its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned.Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair. There may be other grounds, but I see no other grounds available in the present case for the interference of the court*. (Emphasis added.)

[80] *Re Hoare & Co Ltd* was followed by Vaisey J in the English High Court case of *Re Evertite Locknuts Ltd* [1945] 1 Ch 220 at pp 224–225.

Section 209 of the United Kingdom's Companies Act 1948 ('CA 1948 (UK)')

[81] Section 155 of the CA 1929 (UK) was replaced by s 209 of the CA 1948 (UK). The following cases have interpreted s 209 of the CA 1948 (UK):

(a) in *Re Press Caps Ltd* [1949] 1 All ER 1013 at pp 1014 and 1018, Somervell LJ (as he then was) and Wynn-Parry J in the English Court of Appeal accepted *Re Hoare & Co Ltd* in respect of the construction of s 209 of the CA 1948 (UK);

(b) Vaisey J held as follows in the English High Court case of *Re Sussex Brick Co Ltd* [1960] 1 All ER 772 at p 774:

> *Where the statutory majority has accepted the offer the onus must rest on the applicant to satisfy the court that the price offered is unfair ... True, the scheme offers specific grounds for criticism, but in this connexion, 'unfairness' means patent unfairness, obvious unfairness, convincing unfairness, and that has not been established in the present case*.
>
> *I am not satisfied that this scheme is unfair in the sense in which Maugham J used that word in Re Hoare & Co Ltd and I decide that the application ought not to succeed*. (Emphasis added.);

(c) in *Re Bugle Press Ltd* [1961] 1 Ch 270, the minority shareholder adduced evidence that the minority shareholder had received two offers of £12,500 and £14,500 for his shares in the company which were higher than the offer price of £10,000 by the 90% majority shareholders of the company. In the English High Court, at pp 277–278, Buckley J (as he then was) held that, in view of the facts of that case, the company had the burden to show that the offer price of £10,000 was fair. Buckley J decided that the company had failed to show that the offer price was fair and granted a declaration under s 209 of the CA 1948 (UK) that the company was not entitled to acquire the minority shareholder's shares at the offer price. Buckley J further held as follows:

> *In all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide*. It has been recognised in a number of authorities to which I have been referred: *Re Hoare & Co Ltd*, a decision of Maugham J; *Re Press Caps Ltd*; and a decision of Vaisey J in *Re Sussex Brick Co Ltd* — that *where there is a large majority of shareholders who are only concerned to see that they get what they consider to be a fair price for their shares, and who are in favour of accepting the offer, the burden is a heavy one on the dissentient shareholder to show that the offer is not one which he ought reasonably to have to accept*. (Emphasis added.)
>
> The above decision by Buckley J had been affirmed by the Court of Appeal but on a slightly different ground, namely that case involved

'special circumstances'. Evershed MR at pp 286–287:

> ... Even, therefore, *though the present case falls strictly within the terms of s 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special — a case, therefore, of a kind contemplated by Maugham J, to which his general rule would not be applicable. It is no doubt true to say that it is still for the dissident shareholder to establish that the discretion should be exercised in the way he seeks.* That, I think, agreeing with counsel for the company follows from the language of the section which uses the formula 'unless on an application made by the dissenting shareholder ... the court thinks fit to order otherwise'. *But if the dissenting shareholder shows, as he shows here, that the offeror and the ninety per cent of the transferor company's shareholders are the same, then as it seems to me he has prima facie shown that the court ought to order otherwise, since if it should not so do the result would be, as counsel for the company concedes, that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section, but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority*; and that, as it seems to me, is something for the purposes of which prima facie the court ought not to allow the section to be invoked — unless at any rate it were shown that there was some good reason in the interests of the company for so doing, eg, that the minority shareholder was in some way acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own.
>
> I prefer, therefore, to base my decision on the broad ground, which I have tried to state, and do not propose to involve myself in the conflict which has arisen on the evidence as to the correctness of Messrs Price Waterhouse & Co's valuation of the company or its undertaking or its shares; save only to say that, as counsel for the applicant pointed out, in the absence of any evidence filed on behalf of the transferee company, and, therefore, of any opportunity of cross-examination, the fact that offers were made to the applicant in April and May and in an ascending scale of figures appreciably greater than that contained in the July offer and the facts as to the profit earning of this company during the first quarter of 1959, at least show that there is no case here established why the discretion, given the major premise to which I have referred, should not be exercised in the way in which Buckley J exercised it.
>
> *For these reasons I think that we could not properly and should not interfere with Buckley J's exercise of discretion. I should add this. When in his judgment ([1960] 1 All ER at p 772.) Buckley J, based himself or is recorded as basing himself on the view that the onus rested on the transferee company to satisfy the court 'that the proposed price is fair', I would, with respect, not like to let my decision rest on that proposition. I would prefer, as I have said, to put it on the broader ground which is the ground that Buckley J, himself expressed in the penultimate paragraph of his judgment which I earlier read.* (Emphasis added.)

It is clear that *Re Bugle Press Ltd* should be read with caution and with particular reference to the special circumstances of that case; and

(d) in *Re Grierson, Oldham & Adams Ltd* [1967] 1 All ER 192 at pp 196–197, Plowman J (as he then was) held as follows in the English High Court:

> *The first general observation is that the onus of proof here is fairly and squarely on the applicants, and, indeed, they accept that that is so. The onus of proof is on them to establish, if they can, that the offer was unfair. In Re Hoare & Co Ltd, Maugham J had this to say …*
>
> …
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> …
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> *The second general observation which seems to me to be relevant is this: that, since this is not a case of a purchase of assets, but is a case of a purchase of shares, the market price on the Stock Exchange of those shares is cogent evidence of their true value; not conclusive evidence, of course, but cogent evidence …*
>
> …
>
> *In this case the applicants have set out to discharge a formidable onus, bearing in mind not only that the offer price was above the Stock Exchange price, but also that holders of over ninety-nine per cent of the ordinary shares accepted it.*
>
> *The third general observations which arises out of the arguments that have been put forward here concerns the question whether the test of the fairness of the offer is whether it is fair to the individual shareholder or whether it is fair to the body of shareholders as a whole. In my judgment, the test of fairness is whether the offer is fair to the offerees as a body and not whether it is fair to a particular shareholder in the peculiar circumstances of his own case*. (Emphasis added.)

Section 430C of the United Kingdom's Companies Act 1985 ('the CA 1985 (UK)')

[82] Section 430C(1) of the CA 1985 (UK) is similar to our s 224(1) of the CMSA. In *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 at pp 206, 209 and 211, Nicholas Browne-Wilkinson VC decided as follows in the English High Court:

> 5. *The exercise of the discretion*
>
> *I have already said that in my judgment the basic approach to the exercise of the court's discretion in these cases established in relation to the provisions of (CA 1929 (UK)) and (CA 1948 (UK)) is generally applicable to Pt XIII A of (CA 1985 (UK)). Perhaps the most basic principle is that stated by Maugham J in Re Hoare & Co Ltd* (1933) 150 LT 374 *in dealing with a normal take-over bid, ie a bid by an outsider …*
>
> …
>
> The (City Code on Take-overs and Mergers) does not have the force of law. *But in considering for the purposes of s 430C whether the court should exercise its discretion, in my judgment the code is a factor of great importance. One of the purposes of the code is*

to provide protection to the shareholders whose shares are the subject of a bid. Where, under the code, the bidder is himself under a duty to provide such information, substantial infringements of the provisions of the code as to disclosure in my judgment provides strong evidence that the offer is not fairly made: it certainly negatives any presumption that the offer is fair because 90% of the shareholders have accepted it: see Lifecare International plc [1990] BCLC 222. *I am not suggesting that any infringement of the code (however small) will necessarily lead the court to exercise its discretion in favour of the non-assenting shareholders. But substantial failure by the bidder to comply with the code's provisions as to disclosure should, in my view, be a very major factor operating against the compulsory acquisition of the non-assenting shareholders' shares.*

...

In the circumstances I am very far from being satisfied that the offer to the outside shareholders was fairly made at a fair price. The acceptance of the offer by 90% of the shareholders provides no evidence that the price was fair and reasonable. Therefore if I had had to I would have exercised my discretion under s 430C. That section now gives the court two alternatives: either (as under the earlier Acts) to order that the shares shall not be acquired or (and this is a new option under the 1985 Act) to order that the shares should be acquired on different terms. ... (Emphasis added.)

Section 701 of Australia's Corporations Act 1989 ('the CA 1989 (Australia)')

[83] Section 701(6)(b) of the CA 1989 (Australia) provides that a dissenting shareholder may apply to court for an order that the dissenting shareholder's shares are not to be compulsorily acquired.

[84] Owen J (as he then was) gave a comprehensive discourse on s 701 of the CA 1989 (Australia) in the Supreme Court of Western Australia case of *Elkington v Vockbay Pty Ltd* (1993) 10 ACSR 785 at pp 793–794:

The court has a wide discretion when considering an application by a dissenting shareholder for relief under s 701. In a case such as the present, the essential question is whether the offer is fair and reasonable. The phrase 'fair and reasonable' is, of course, well known in various areas of the law and in particular in corporate and securities law. It has something of an elastic quality in that it is governed by the facts of each particular case. However, the authorities do provide some guidance as to the way in which the assessment ought to be approached.

First, the onus is on the dissenting shareholder to establish that the offer is unfair: Re Hoare & Co Ltd (1933) 150 LT 374 at p 375; *Re Grierson, Oldham & Adams Ltd* [1968] 1 Ch 17 at p 30–1; *Eddy v WR Carpentar Holdings Ltd* (1985) 10 ACLR 316 per Rowland J at 318.

Secondly, the test of whether an offer is fair is whether it is fair to the body of the shareholders as a whole rather than whether it is fair to the particular shareholder in the peculiar circumstances of his case: Grierson, at p 32.

Thirdly, although in some cases such an onus may be discharged with ease, the

evidentiary burden to show that the offer is unfair will be greater where it is the fact that the offeror has already received acceptances from a large proportion of the shareholders holding a large proportion of the issued capital: Eddy, at p 318. *Put in a slightly different way, the level of acceptances received from the body of shareholders as a whole will be a relevant factor in determining fairness. A very high level of acceptances prima facie suggests that the offer is fair: Re Evertite Locknuts Ltd* [1945] 1 Ch 220 at p 222. *On the other hand it must always be borne in mind that the compulsory acquisition procedure involves an exceptional interference with rights of individual ownership and a degree of circumspection is required: Blue Metal Industries Ltd v Dilley* [1969] 3 All ER 437 at 443.

Fourthly, it is not sufficient to demonstrate that the offer is open to criticism or could be improved upon. In Sussex Brick Co [1961] Ch 289, Vaisey J said at p 291–3:

...

Fifthly, in the absence of very strong grounds, the court should be guided by what commercial people, who are concerned with the transaction, think about the offer and should be slow to substitute its own view of the fairness of the scheme in opposition to the stance apparently taken by the majority of those who are more directly involved: Re Bugle Press Ltd [1961] Ch 270 at p 276.

Sixthly, the degree of compliance with statutory formalities is a factor which could impinge on the notions of fairness: Rathie v Montreal Trust Co (1953) 4 DLR 289.

Finally, in determining whether the offer is fair, the court is not restricted to examining the amount of the consideration offered, but may investigate the conduct of the offeror in the period preceding the making of the offer: Catto v Ampol Ltd (1989) 16 NSWLR 342; 15 ACLR 307. (Emphasis added.)

[85] The CA 1989 (Australia) has now been replaced by the CA 2001 (Australia).

Section 664F of the CA 2001 (Australia)

[86] Section 664F of the CA 2001 (Australia) provides as follows:

664F *The Court's power to approve acquisition*

(1) *If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder may apply to the Court for approval of the acquisition of the securities covered by the notice.*

(2) The 90% holder must apply within 1 month after the end of the objection period.

(3) *If the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the Court must approve the acquisition of the securities on those terms. Otherwise it must confirm that the acquisition will not take place.*

A (4) The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs. (Emphasis added.)

B **[87]** Section 664F of the CA 2001 (Australia) is materially different from our s 224(1) of the CMSA as follows:

(a) according to s 664F(1) of the CA 2001 (Australia), the 90% majority shareholder of the company has to obtain court approval for the
C compulsory acquisition of the remaining 10% shares; and

(b) by reason of s 664F(3) of the CA 2001 (Australia), the 90% majority shareholder of the company has to satisfy the court that the terms of the compulsory acquisition give a 'fair value' for the remaining 10% shares. If the 90% majority shareholder of the company cannot satisfy the
D court, the court 'must confirm that the acquisition will not take place'.

[88] In view of the substantial differences between s 664F of the CA 2001 (Australia) and our s 224(1) of the CMSA, Australian cases on s 664F of the CA 2001 (Australia) should be read with caution.
E

Section 208 of the CA 1955 (NZ)

[89] Section 208(1) of the CA 1955 (NZ) provides that compulsory acquisition of a company's shares may be averted if the court 'thinks fit' to order
F as such. In *Re Deans* [1986] 2 NZLR 271 at pp 273 and 277, Hardie Boys J (as he then was) decided as follows in the New Zealand High Court:

> 'This is an application by a dissenting shareholder pursuant to subs (1) of s 208 of the Companies Act 1955. This section, which has counterparts in other
G Commonwealth jurisdiction, enables a company which has made a takeover offer in respect of the shares of another company to acquire compulsorily the shares of dissentients where at least 90% in value of the shareholders have accepted the offer within four months of its making. This result may be averted only if on application by a dissentient 'the Court thinks fit to order otherwise'. *The statute thus appears to confer an untrammelled discretion. However it is well established in England, and*
H *counsel were agreed that the same approach should be taken in New Zealand (where the topic has apparently not been the subject of any reported decision) that the Court will not interfere unless the takeover scheme is unfair: see Re Hoare and Co Ltd* (1933) 150 LT 374, 375, *per Maugham J*, approved in, for example, *Re Press Caps Ltd* [1949] 1 All ER 1013, 1014 (CA) and *Re Bugle Press Ltd* [1960] 3 All ER 791, 794 (CA); *and this*
I *means unfair to the shareholders as a whole and not in the particular circumstances in which the applicant is placed: see Re Grierson, Oldham & Adams Ltd* [1968] Ch 17, 33 *per Plowman J*: ...
>
> ... *I have already expressed the conclusion that, on the authorities, the onus is on the dissentient to show that the offer is unfair, not on the offeror to show the contrary* ...

If I am correct, the result is that in the absence of any material to the contrary, I must assume that the price offered includes fair recompense for the shareholders' loss of their rights of participation, and that it therefore cannot be unfair for them to lose that right as a consequence of their acceptance of the offer. (Emphasis added.)

This court's interpretation of s 224(1) of the CMSA

[90] I am of the following view regarding s 224(1) of the CMSA:

(a) the court has a wide discretion in deciding whether to make an order under s 224(1)(a) or (b) of the CMSA — *Re Chez Nico (Restaurants) Ltd*, *Elkington* and *Re Deans*. Cases on the exercise of judicial discretion, do not constitute binding legal precedents as the exercise of discretion in a particular case is based purely on the facts of that case;

(b) the legal burden is on the litigating dissenting shareholders to persuade the court on a balance of probabilities to invoke its discretion under s 224(1) of the CMSA — *Re Hoare & Co Ltd*, *Re Grierson, Oldham & Adams Ltd*, *Elkington* and *Re Deans*; and

(c) in the exercise of the court's discretion under s 224(1) of the CMSA:

(i) the court should bear in mind the purpose of ss 222 and 224 of the CMSA as explained in *Vlok*'s case — to ensure that there is no greenmailing of the majority shareholder by the minority shareholder. As such, the bona fides (or the lack of it) of the litigating dissenting shareholders is significant;

(ii) the court should be slow to substitute its own view of the fairness of the terms of the proposed compulsory acquisition, in place of a commercial decision made by a majority of the shareholders in question — *Re Hoare & Co Ltd* and *Re Bugle Press Ltd* (Buckley J's judgment in the High Court);

(iii) the court should only exercise its discretion under s 224(1) of the CMSA if there is 'patent unfairness, obvious unfairness, convincing unfairness' in respect of the terms of the proposed compulsory acquisition — *Re Sussex Brick Co Ltd*. In this regard, I must respectfully decline to follow the less stringent 'fair and reasonable' test which has been laid down in *Elkington*. I am in favour of a stricter test of 'patent unfairness' because:

(1) the offeror has fulfilled the 90% requirement and such a high level of acceptance of the offer gives a prima facie indication of the fairness of the terms of the proposed compulsory acquisition — *Re Evertite Locknuts Ltd* and *Elkington*; and

(2) a less stringent 'fair and reasonable' test may not promote the purpose of ss 222 and 224 of the CMSA (to ensure that the minority shareholder does not greenmail the majority shareholder);

(iv) in deciding whether there is patent unfairness regarding the terms of the proposed compulsory acquisition, the court should consider whether there is patent unfairness to the body of the shareholders as a whole and the court should not consider whether an offer is fair to a particular litigating dissenting shareholder in the peculiar circumstances of the litigating dissenting shareholder — *Re Grierson, Oldham & Adams Ltd*; and

(v) the court may take into account any breach of the law or MCTM by the offeror or the majority shareholder — *Re Chez Nico (Restaurants) Ltd*.

SHOULD THE COURT EXERCISE ITS DISCRETION UNDER S 224(1) OF THE CMSA IN THIS CASE?

[91] Firstly, I find that the litigating dissenting shareholders lack bona fides in filing these 3 OS. Such a finding is premised on the following reasons:

(a) En Amin was the deputy chairman, director and substantial shareholder of IB at the material time. In IAC dated 4 March 2015, En Amin had 'confirmed' that he would reject the defendant's revised offer. Encik Amin's public statements stated, among others, that En Amin was planning a RM1.2 billion VGO for IB's shares together with other 'business entrepreneurs'. Despite En Amin's above 'confirmation' in IAC dated 4 March 2015 and En Amin's public statements, En Amin did a 'volte-face' by accepting the defendant's revised offer. In fact, En Amin sold 24.76% of IB shares and received RM242,027,938.75. If En Amin had not sold his IB shares, the defendant would not have fulfilled the 90% requirement;

(b) Pn Nor'aini sold 4,337,826 IB shares and had received RM14,097,935;

(c) Mr Chan had reduced his 5,000 IB shares to a mere 1,000 shares in IB so as to enable him to have the necessary locus standi to file the third OS.

I am not able to accept the contention that En Amin, Pn Nor'aini and Mr Chan 'had' to sell their IB shares due to shortage of time and the 'threat' that IB could be delisted from Bursa. This was because even if the defendant was allowed to proceed with the compulsory acquisition of the litigating dissenting shareholders' shares and IB was subsequently delisted from Bursa, the defendant was nonetheless still required under s 222(7)(b) of the CMSA to pay the litigating dissenting shareholders in accordance with the defendant's revised offer;

(d) Pn Nor'aini is En Amin's wife while Mr Chan and Mr Yau are part of Messrs CA who had previously acted for En Amin. Messrs CA's letter dated 8 June 2015 contained serious allegations against the defendant (regarding a material omission by the defendant in the defendant's offer, breach of s 67(1) of the CA and insider trading) which I have found to be

baseless (please see the above Parts G, H and I). It could not have been a coincidence for the 3 OS to have been filed by En Amin, Pn Nor'aini, Mr Yau and Mr Chan;

(e) there are striking similarities between the first and second OS. Such a fact supports an inference of a conspiracy by En Amin, Pn Nor'aini, Mr Yau and Mr Chan to frustrate unlawfully the defendant's compulsory acquisition of IB shares;

(f) Mr Yau had filed the second OS in the Kuala Lumpur High Court. There was no reason for Mr Chan (Mr Yau's colleague in Messrs CA) to have filed the third OS in the Ipoh High Court. The filing of the third OS in Ipoh High Court had unnecessarily troubled the defendant in terms of time, effort and costs to file an application to transfer the third OS to the Kuala Lumpur High Court;

(g) there was no reason for En Amin, Pn Nor'aini and Mr Yau to oppose the defendant's application (which did not concern the litigating dissenting shareholders). Yet, En Amin, Pn Nor'aini and Mr Yau had instructed their learned counsel to oppose unnecessarily the defendant's application; and

(h) En Amin had only 8,800 IB shares while Pn Nor'aini owned 10,000 shares in IB. Mr Chan had a mere 1,000 IB shares. Even if this court accepts the allegation of the litigating dissenting shareholders that the 'true value' of IB shares is RM3.66 per share, this means that the litigating dissenting shareholders are only entitled to an additional 41 sen per IB share (the revised offer price was RM3.25 per IB share), namely:

(i) En Amin is only entitled to an additional sum of RM3,608;

(ii) Pn Nor'aini is only entitled to an additional sum of RM4,100; and

(iii) Mr Yau and Mr Chan are only entitled to an additional sum of RM410 each.

It is difficult to accept the bona fides of En Amin and Pn Nor'aini in filing the first OS when En Amin and Pn Nor'aini had already received RM242,027,938.75 and RM14,097,935 respectively. The bona fides of Mr Yau and Mr Chan is also doubted in view of their maximum gain of only RM410 each if the second and third OS are allowed under s 224(1)(b) of the CMSA. There is simply no commercial justification or reason for these 3 OS to be filed.

[92] The reasons explained in the above para 90, supports the inference that the litigating dissenting shareholders have conspired to obstruct unlawfully the defendant's compulsory acquisition of IB shares. The aforesaid lack of good faith on the part of the litigating dissenting shareholders in filing the 3 OS, in itself, is a sufficient ground for this court to exercise its discretion to refuse to

act under s 224(1)(a) or (b) of the CMSA.

[93] In accordance with *Re Grierson, Oldham & Adams Ltd*:

(a) I have considered whether there was patent unfairness in the defendant's revised offer to the body of IB's shareholders as a whole; and

(b) I cannot consider whether there was patent unfairness in the defendant's revised offer to the litigating dissenting shareholders in the peculiar circumstances of the litigating dissenting shareholders.

I am not able to find any patent unfairness in the defendant's revised offer to the body of IB's shareholders as a whole.

[94] I have not overlooked MASSB's second recommendation wherein:

(a) MASSB was of the view that the defendant's revised offer was 'not fair but reasonable'; and

(b) MASSB recommended the holders of the offer shares to accept the defendant's revised offer.

[95] I do not find that MASSB's opinion (the defendant's revised offer was 'not fair but reasonable') constituted patent unfairness in the defendant's revised offer to the body of IB's shareholders as a whole. My reasons are as follows:

(a) MASSB's second recommendation was for the holders of the offer shares to accept (not to reject) the defendant's revised offer;

(b) a high percentage of the holders of the offer shares, including En Amin and Pn Nor'aini, had accepted the defendant's revised offer; and

(c) the phrase 'not fair but reasonable' must be understood in the context of paras 3.1–3.6 of Practice Note 15. I reproduce paras 3.1–3.6 of Practice Note 15 as follows:

Independent adviser's recommendation

3.1 *Under paragraph 4 of the Second Schedule and paragraph 5 of the Third Schedule to the (MCTM), the independent advice circular should include comments and advice on the reasonableness of the relevant take-over offer or proposal. In this regard, a recommendation on a take-over offer or proposal made by an independent adviser must contain adequate information and be meaningful and useful to assist shareholders of offeree companies in making an informed decision as to the merits of the take-over offer or proposal as follows*:

(d) *in relation to a take-over offer, the term 'fair and reasonable' should generally be analysed as two distinct criteria i.e. whether the offer is*

'fair'; and whether the offer is 'reasonable', rather than as a composite term; *and*

(e) where evaluating exemptions from mandatory offers, the term 'fair and reasonable' may be considered on a holistic basis.

3.2 *In considering whether a take-over offer can be considered 'fair', the independent adviser should assess if the offer price or value of consideration is equal to or greater than the value of the securities that are the subject of the take-over offer*, based on the following criteria:

(a) If the offer price (or value of consideration) is equal to or higher than the market price and is also equal to or higher than the value of the securities of the offeree, the take-over offer is considered as 'fair'; and

(b) *If the offer price (or value of consideration) is equal to or higher than the market price, but is lower than the value of the securities of the offeree, the take-over offer is considered as 'not fair'*.

3.3 The independent adviser should not consider the percentage holding of the offeror or its associates in the offeree when making the above comparison, but should instead value the securities assuming 100% of the offeree is being acquired.

3.4 *In considering whether a take-over offer is 'reasonable', the independent adviser should take into consideration matters other than the valuation of the securities that are the subject of the take-over offer. Generally, a take-over offer would be considered 'reasonable' if it is 'fair'. Nevertheless, an independent adviser may also recommend for shareholders to accept the take-over offer despite it being 'not fair', if the independent adviser is of the view that there are sufficiently strong reasons to accept the offer in the absence of a higher bid and such reasons should be clearly explained*.

3.5 The independent adviser should take into consideration all relevant factors in evaluating whether an offer is 'reasonable' including, but not limited to, the following:

(a) The existing shareholding of the offeror and persons acting in concert with the offeror in the offeree and their ability to pass special resolutions or control the assets of the offeree;

(b) Any other significant shareholding in the offeree (other than (a) above);

(c) The liquidity of the market in the offeree's securities; (d) The expected market price if the take-over offer is unsuccessful; (e) The likelihood and value of alternative offers or competing offers before the close of the take-over offer.

A

> 3.6 *In the event the independent adviser concludes that a take-over offer is 'not fair but reasonable', the independent adviser must clearly explain the following*:
>
> (a) *What is meant by 'not fair but reasonable' ;*
>
> B
>
> (b) *How the independent adviser has reached this conclusion; and*
>
> (c) *The course of action that the shareholders are recommended to take pursuant to the conclusion. (Emphasis added.)*

C

When MASSB was of the opinion that the defendant's revised offer was 'not fair but reasonable':

(a) the description 'not fair' meant that the revised offer price was lower than the value of IB shares as understood in paras 3.1(a) and 3.2(b) of Practice Note 15;

D

(b) despite the fact that the revised offer price was lower than the value of IB shares (not fair), MASSB was nevertheless of the view that there were sufficiently strong reasons to accept the defendant's revised offer in the absence of a higher bid (reasonable) — please see para 3.4 of Practice Note 15; and

E

(c) notwithstanding MASSB's opinion that the defendant's revised offer was 'not fair but reasonable', MASSB's second recommendation clearly stated that the holders of the offer shares should accept the defendant's revised offer — please see para 3.6(a), (b) and (c) of Practice Note 15.

F

In view of the above reasons, I do not see how the litigating dissenting shareholders could rely on MASSB's opinion that the defendant's revised offer was 'not fair but reasonable', to show patent unfairness in the defendant's revised offer to the body of IB's shareholders as a whole.

G

[96] In the above Parts G, H and I, this court has found no evidence of:

H

(a) material omission by the defendant;

(b) breach of s 67(1) of the CA by the defendant; or

(c) insider trading by the defendant.

I

There is also no evidence that that the defendant has breached any provision in the CMSA, CA and/or MCTM so as to persuade this court to invoke its discretion under s 224(1)(a) or (b) of the CMSA.

[97] In view of the above reasons, I am constrained to find that the litigating

dissenting shareholders have failed to discharge the legal onus on a balance of probabilities to persuade this court to exercise its discretion under s 224(1)(a) or (b) of the CMSA.

TWO CONSTITUTIONAL ISSUES

[98] Article 13 of the FC provides as follows:

> Rights to property
>
> 13(1) *No person shall be deprived of property save in accordance with law*.
>
> (2) *No law shall provide for the compulsory acquisition or use of property without adequate compensation*. (Emphasis added.)

[99] The following two constitutional questions arise in this case:

(a) whether ss 222 and 224 of the CMSA are constitutional; and

(b) whether the defendant's compulsory acquisition of IB shares belonging to the litigating dissenting shareholders had contravened art 13(1) and/or (2) of the FC.

Constitutionality of ss 222 and 224 of the CMSA

[100] In deciding whether ss 222 and 224 of the CMSA are constitutional, there is a 'strong presumption' that ss 222 and 224 of the CMSA as enacted by Parliament, are constitutional — please see the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at p 576.

[101] Firstly, I am of the view that art 13(1) of the FC only applies to strike down and render unconstitutional, acts of deprivation, forfeiture, confiscation and destruction of private property which are not 'in accordance with law'. The term 'law' is widely interpreted in art 160(2) of the FC to include written law, the common law in so far as it is in operation in Malaysia or any part thereof, and any custom or usage having the force of law. I refer to the majority judgment of the Privy Council delivered by Lord Dilhorne in *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 at p 135 ('*Selangor Pilot Association*'), as follows:

> *The first question for consideration is whether this restriction on the exercise of a pilot's rights given by the grant of a licence amounted to a deprivation of property*. An ordinary driving licence in the United Kingdom entitles its holder to drive many classes of vehicles, including heavy locomotives. If Parliament in its wisdom thought it advisable that in future drivers of heavy locomotives should have a special test and that unless the holders of driving licences had passed that test, they should not drive heavy locomotives, could it be said that all holders of driving licences were in

consequence deprived of property? *Does disqualification from holding a driving licence involve deprivation of property?*

In the opinion of their Lordships, the answer to these questions is in the negative. In their view the restriction placed on the activities of individual licensed pilots did not deprive them of property and if this be the case, it is hard to see that it can be said to have deprived the licensed pilots who were partners in the Association of property. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither being property.

The result was that the Association could no longer carry on its business and employ licensed pilots but unless it was deprived of property otherwise than in accordance with law or its property was compulsorily acquired or used by the Port Authority, there was no breach of Article 13. (Emphasis added.)

I must point out the majority of the Privy Council's opinion has reversed the Federal Court's decision in *Selangor Pilot Association* (cited in the written submission in support of the third OS).

[102] Based on *Selangor Pilot Association*, art 13(1) of the FC does not apply to a compulsory acquisition of a company's shares as provided in ss 222 and 224 of the CMSA. Compulsory acquisitions of property is provided in art 13(2) of the FC.

[103] Secondly, art 13(1) of the FC does not restrict Parliament's legislative powers. Parliament is clearly empowered under arts 73(a), 74(1) and Item 8(c) (regulation of corporations) of List 1 (Federal List) of the Ninth Schedule to FC, to enact ss 222 and 224 of the CMSA. Accordingly, ss 222 and 224 of the CMSA cannot be contrary to art 13(1) of the FC. I rely on two judgments of the Federal Court as follows:

(a) in *Philip Hoalim Jr & Anor v State Commissioner, Penang* [1974] 2 MLJ 100 at p 103, Ali FCJ decided as follows:

Likewise I must say that no question as to the effect of art 13(1) *of the Constitution has arisen for the consideration of this court. The said Article clearly does not restrict legislative powers but merely declares unconstitutional or prohibits any illegal executive acts of depriving property*. See commentary on this provision by Sheridan and Groves in 'The Constitution of Malaysia' on p 44. *The four orders named in the second question, particularly Pg PU 39/69, do not have the effect of depriving any person of his property. Pg PU 39/69, for instance, does no more than what is permitted to be done by* s 102(1) *of the Code. If the applicants' right is affected by any of the said orders it is because Parliament has provided that it can be so affected.* Article 13(1) *of the Constitution does not restrict the legislative powers of Parliament*. (Emphasis added.); and

(b) Gill CJ (Malaya) held as follows in *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 at p 30:

The major ground of appeal is that the learned judge erred in law on the

construction of the term 'in accordance with law' in art 13(1) *of the Constitution of Malaysia*. *In my judgment this ground is equally untenable*. So far as the power of taxation is concerned, the Constitution recognizes no fundamental right to immunity from taxation and that is presumably the reason why no constitutional protection is provided against the exercise of that power. Taxation is an independent power of the State. *The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking* art 13(1) *of the Constitution, however arbitrary the law might palpably be* ... (Emphasis added.)

[104] Thirdly, I am of the opinion that ss 222 and 224 of the CMSA do not contravene art 13(2) of the FC due to the following reasons:

(a) the IB shares of the litigating dissenting shareholders are not compulsorily acquired by the defendant without any compensation. The defendant is obliged under s 222(7)(b) of the CMSA to pay the litigating dissenting shareholders in accordance with the defendant's revised offer; and

(b) if the litigating dissenting shareholders are able to discharge the legal onus to satisfy this court to exercise its discretion under s 224(1), the court may:

(i) order under s 224(1)(a) of the CMSA that the defendant shall not be entitled to and shall not be bound to acquire the litigating dissenting shareholders' shares; *or*

(ii) specify under s 224(1)(b) of the CMSA the terms for the defendant to acquire compulsorily the IB shares of the litigating dissenting shareholders. It is clear that under s 224(1)(b) of the CMSA, the court may order 'adequate compensation' for the defendant's compulsory acquisition of the litigating dissenting shareholders' shares.

[105] The above view that ss 222 and 224 of the CMSA are constitutional vis a vis art 13(1) and (2) of the FC, is supported by a judgment of the Supreme Court of Canada (which has been cited by Mr Suhendran). In *Esso Standard (Inter-America) Inc v JW Enterprises Inc & Ors* [1963] SCR 144 ; 37 DLR (2d) 598, Judson J delivered the following judgment of the Canadian Supreme Court which upheld the constitutionality of s 128 of the Companies Act 1952 of Canada (which provided for compulsory acquisition of a company's shares):

... *I think that it was foreseen in the obiter opinion of Rand J in Rathie v Montreal Trust Company et al* [1953] 2 SCR 204 at p 213, *when he said*:

...

The respondents, in support of their judgment, submitted an alternative argument

that s 128 was unconstitutional. The question had been raised and argued in the Rathie case but this Court found it unnecessary to decide the point because of the failure of the transferee company to comply with the time requirements of the section. It has again been raised and fully argued throughout the course of the litigation. There has been complete unanimity throughout that Parliament has the power to enact s 128. The matter was summarised by Laidlaw JA as follows:

> *It is my opinion that the Parliament of Canada having legislative power to create companies whose objects extend to more than one Province possesses also the legislative power to prescribe the manner in which shares of the capital of such companies can be transferred and acquired. That matter is one of general interest throughout the Dominion.*

It is truly legislation in relation to the incorporation of companies with other than provincial objects and it is not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province. It deals with certain conditions under which a person may become a shareholder or lose his position as a shareholder in such a company and, in my opinion, this case is completely covered by the reasons of this Court in Reference re constitutional validity of s 110 of the Dominion Companies Act ... (Emphasis added.)

[106] There are compulsory acquisition provisions in the companies legislation of the United Kingdom, Australia, New Zealand and Singapore. I am not aware of any constitutional challenge to those statutory provisions. Nor am I aware that the courts in those countries have decided that these statutory provisions are unconstitutional. I am however satisfied of the constitutionality of ss 222 and 224 of the CMSA.

[107] Before I leave this subject, I need to point out that the Court of Appeal's judgment in *Kekatong Sdn Bhd* (cited in the written submission in support of the third OS) has been reversed by the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, intervener)* [2004] 2 MLJ 257.

The defendant's compulsory acquisition of litigating dissenting shareholders' shares is constitutional

[108] As explained above, the defendant had complied with s 222 of the CMSA in this case. The litigating dissenting shareholders have also failed to discharge the legal burden to persuade this court to act under s 224(1)(a) or (b) of the CMSA. Accordingly, the defendant's compulsory acquisition of IB shares belonging to the litigating dissenting shareholders, is both constitutional and lawful.

COSTS

[109] Mr Suhendran had submitted that this court should award costs on an indemnity basis against the litigating dissenting shareholders under s 224(4)(a) and (b) of the CMSA in view of, among others, the following reasons:

(a) the litigating dissenting shareholders, especially En Amin, had attempted to greenmail the defendant into paying a higher price for the IB shares owned by the litigating dissenting shareholders; and

(b) the litigating dissenting shareholders had unlawfully obstructed the defendant's compulsory acquisition of IB shares.

[110] Mr Suhendran prayed for an amount of RM100,000 as costs to be ordered on an indemnity basis against the litigating dissenting shareholders. Mr Suhendran had cited the following cases in support of the above contention:

(a) the judgment of Victoria's Court of Appeal in *Winpar Holdings Ltd v Austrim Nylex Ltd (No 2)* (2005) 56 ACSR 524;

(b) the decision of the Supreme Court of Victoria in *Austrim Nylex Ltd v Kroll & Ors (No 3)* (2002) 42 ACSR 479; and

(c) the New Zealand High Court case of *Plaza Fabrics (Tauranga) Ltd v National Airlines Co Ltd* [1992] 1 NZLR 584.

[111] I am of the following view regarding costs in respect of s 224(1) Suits:

(a) whether the court awards costs and its amount, depends on the exercise of the court's discretion — O 59 r 3(2) of the RC;

(b) if a litigating dissenting shareholder succeeds in a s 224(1) Suit:

  (i) as a general rule, the litigating dissenting shareholder should be entitled to costs against the offeror. This is because generally, costs follow the event as provided in O 59 r 3(2) of the RC — please see the judgment of the Supreme Court delivered by Hashim Yeop Sani SCJ (as he then was) in *Petroliam Nasional Bhd & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 at p 26; or

  (ii) there may be exceptional reasons for the court to:

    (1) deprive the successful litigating dissenting shareholder of his or her costs of the s 224(1) Suit; or

    (2) order the successful litigating dissenting shareholder to pay the costs of the s 224(1) Suit to the offeror;

(c) if the s 224(1) Suit is dismissed:

(i) as a general rule, the court should not exercise its discretion to order costs of the s 224(1) Suit to be paid by the litigating dissenting shareholder to the offeror; or

(ii) there may be exceptional reasons for the court to order the litigating dissenting shareholder to pay costs of the s 224(1) Suit to the offeror, namely:

(1) the s 224(1) Suit is unnecessary — s 224(4)(a) of the CMSA;

(2) the s 224(1) Suit is improper — s 224(4)(a) of the CMSA;

(3) the s 224(1) Suit is vexatious — s 224(4)(a) of the CMSA;

(4) there has been unreasonable delay in filing the s 224(1) Suit — s 224(4)(b) of the CMSA; *and/or*

(5) there had been unreasonable conduct of the litigating dissenting shareholder in conducting the s 224(1) Suit — s 224(4)(b) of the CMSA; and

(d) if costs are awarded under s 224(4) of the CMSA, the basis for quantifying the quantum of costs is as follows:

(i) as explained in *See Teow Koon v Kian Joo Factory Bhd & Ors* [2016] MLRHU 153, at para 140, as a general rule, the court should exercise its discretion to order costs on a standard basis — please see O 59 r 16(2)(a) and (3) RC; or

(ii) there may be exceptional reasons for the court to award costs on an indemnity basis — please see O 59 r 16(2) of the RC (where 'it appears to the court to be appropriate to order costs to be determined on the indemnity basis').

[112] Section 664F(4) of the CA 2001 (Australia) provides as follows:

> The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs.

Section 664F(4) of the CA 2001 (Australia) is different from our s 224(4) of the CMSA. As such, Australian cases on s 664F(4) of the CA 2001 (Australia) should be read with caution.

[113] I am of the view that En Amin and Pn Nor'aini are the protagonists in these 3 OS. This view is premised on the following reasons:

(a) En Amin was the deputy chairman, director and substantial shareholder of IB. Pn Nor'aini owned a substantial amount of IB shares;

(b) En Amin's public announcements regarding his purported RM1.2 billion VGO, clearly showed his intention to derail the defendant's compulsory acquisition of IB shares; and

(c) En Amin and Pn Nor'aini had received RM242,027,938.75 and RM14,097,935 respectively from their disposal of IB shares. It is clear that both En Amin and Pn Nor'aini had very significant financial interest in the outcome of the defendant's compulsory acquisition of IB shares.

[114] As I have found that En Amin and Pn Nor'aini to be the protagonists in these 3 OS, Mr Chan and Mr Yau should not be personally liable for costs in this case.

[115] I am of the opinion that En Amin and Pn Nor'aini should pay costs of these 3 OS to the defendant. This is premised on the following reasons:

(a) the 3 OS were unnecessary, improper and/or vexatious within the meaning of s 224(4)(a) of the CMSA. Such a finding is supported by the following evidence and reasons —

(i) as explained in the above para 90, these 3 OS had not been filed in good faith; *and/or*

(ii) Messrs CA's letter dated 8 June 2015 contained serious and unfounded allegations against the defendant regarding a material omission by the defendant in the defendant's offer, breach of s 67(1) of the CA and insider trading; *and/or*

(b) there was unreasonable conduct by En Amin and Pn Nor'aini in conducting these 3 OS under s 224(4)(b) of the CMSA when En Amin and Pn Nor'aini unnecessarily objected to the defendant's application.

[116] I do not consider the eight days' delay in filing the first OS to be unreasonable within the meaning of s 224(4)(b) of the CMSA.

[117] In view of the finding and reasons expressed in the above para 114, there are exceptional reasons to warrant an exercise of this court's discretion under O 59 r 16(2) of the RC to order En Amin and Pn Nor'aini to pay costs to the defendant on an indemnity basis. According to O 59 r 16(4) of the RC, costs on an indemnity basis means 'all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party'.

[118] I exercise my discretion to award costs of RM50,000 to be paid on an

indemnity basis by En Amin and Pn Nor'aini to the defendant. My reasons are as follows:

(a) these 3 OS raised novel and difficult questions regarding ss 222 and 224 of the CMSA;

(b) this case concerned a takeover of a public listed company which required specialised skill and knowledge of counsel. Mr Suhendran is a senior member of the Bar who specialised in take-overs and compulsory acquisitions of shares in public listed companies;

(c) Mr Suhendran had conducted extensive research and had assisted this court with cases from the United Kingdom, Australia, New Zealand, South Arica and Canada. Reports of Law Commission and Committees from the United Kingdom and Australia had also been referred to by Mr Suhendran;

(d) the disposal of these 3 OS had taken a considerable number of days;

(e) lengthy written submissions had been filed by all parties in these 3 OS; and

(f) voluminous affidavits and exhibits had been filed in this case.

SUMMARY OF THE COURT'S DECISION AND ORDER

[119] In summary:

(a) the second intervention applications were dismissed because according to s 224(1)(a) and (b) of the CMSA, these 3 OS did not concern IB shares held by the proposed interveners;

(b) pending the disposal of the 3 OS, the defendant was entitled under s 222 of the CMSA and pursuant to the defendant's s 222(1) Notice, to complete the compulsory acquisition of IB shares held by the non-litigating dissenting shareholders;

(c) there was no evidence that the defendant had:

(i) committed an offence under s 221(1)(a) and (B) of the CMSA regarding JTUA 3; or

(ii) breached s 41(1)(b) of the MCTM;

(d) the defendant had not breached s 67(1) of the CA in this case;

(e) there was no evidence of insider trading by the defendant;

(f) SGA does not apply to compulsory acquisition of shares;

(g) the defendant had satisfied all the requirements for compulsory acquisition of IB shares belonging to the litigating dissenting shareholders;

(h) the plaintiffs in the first and second OS were granted extensions of time to proceed with the s 224(1) Suits;

(i) the court cannot exercise its discretionary power under s 224(1)(a) or (b) of the CMSA because:

(i) the litigating dissenting shareholders had not acted in good faith in filing these 3 OS;

(ii) there was no patent unfairness in the defendant's revised offer to the body of IB's shareholders as a whole; and

(iii) the litigating dissenting shareholders had not discharged the legal burden to persuade the court to act under s 224(1)(a) or (b) of the CMSA;

(j) ss 222 and 224 of the CMSA are constitutional vis a vis art 13(1) and (2) of the FC. The defendant's compulsory acquisition of the litigating dissenting shareholders' shares is also constitutional and valid; and

(k) En Amin and Pn Nor'aini shall pay costs on an indemnity basis to the defendant because:

(i) these 3 OS are unnecessary, improper and/or vexatious according to s 224(4)(a) of the CMSA; and/or

(ii) En Amin and Pn Nor'aini have been guilty of unreasonable conduct in conducting these 3 OS under s 224(4)(b) of the CMSA.

[120] Premised on all the above reasons and evidence, the following orders are made:

(a) the second intervention applications are dismissed with costs;

(b) the defendant is given the liberty to complete the compulsory acquisition of IB shares held by the non-litigating dissenting shareholders;

(c) except for allowing prayer 1 in the first and second OS (extending time for the first and second OS to proceed on their merits), all the 3 OS are dismissed;

(d) the defendant have the liberty to proceed with and/or to complete the compulsory acquisition of IB shares of the plaintiffs in these 3 OS;

(e) costs of RM50,000 shall be paid only by En Amin and Pn Nor'aini to the defendant; and

(f) allocator fee of 4% on the amount of costs.

Ordered accordingly.

Reported by Afiq Mohamad